Fighting the Culture War as a Neutral Observer: A Profile of Justice Scalia’s Machinations in Lawrence v. Texas

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I remain confident that someday a Supreme Court with a sense of fairness and an adequate vision of the Constitution will repudiate Bowers in the same way that a wise and fair-minded Court once repudiated Plessy. Indeed, I hope that day will not be long coming. In my view of the Constitution, there is no more justification for discrimination against individuals because of their sexual orientation, which most frequently is a happenstance of birth, than there is for discrimination against blacks, Hispanics or Asians—or against Catholics, Jews, or Muslims, who at least have the option to convert.

Judge Reinhardt

Six years after he dissented against upholding “Don’t Ask, Don’t Tell” in *Holmes v. California National Guard*, Judge Reinhardt finally got his wish: the Supreme Court overturned *Bowers v. Hardwick*. Though *Bowers* was overturned, was it overturned to end sexual apartheid?

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1 *Plessy v. Ferguson*, 163 U. S. 537 (1896). Enforced separation, according to the Opinion of the Court rendered by Justice Brown, did not stamp “the colored race with a badge of inferiority.” *Id.* at 551. This view was supported by the common practice of school segregation, see, *e.g.*, *id.* at 544 (“Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”). In his dissent, Judge Harlan saw the badges of inferiority invisible to Justice Brown. The 13th Amendment not only struck down slavery, “but the imposition of any burdens or disabilities that constitute badges of slavery or servitude,” also decreeing “universal freedom in this country.” *Id.* at 554 (Harlan, J., dissenting). “Separate but equal” was a badge of inferiority inasmuch as it was employed by the white race to maintain its integrity (read: purity) and its desire not to be corrupted by contact with black people. Queer people also wear a badge of inferiority. Their badge of inferiority is evident in the policy “Don’t Ask, Don’t Tell,” the denial of 1,138 federal benefits to married same-sex couples, and the widespread bigotry expressed by Justice Scalia when he spoke for “many Americans,” who do not want to be associated people practicing that kind of lifestyle. *Lawrence v. Texas* 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). The integrity of heterosexuality can only be maintained by not having contact with corrupt homosexuals. “Don’t Ask, Don’t Tell” entails that homosexuals relinquish their sexual identities; in effect, they must pose as heterosexuals or at the very least ex-gays—they cannot admit their homosexuality in word or exhibit it in deed. In this way, heterosexual purity is maintained with the appearance of allowing “gays” into the military. As Judge Reinhardt remarked: “To the contrary, the military now purports to welcome into the service individuals who are homosexuals -- but only so long as they don’t engage in homosexual conduct. This might appropriately be analogized to welcoming Jews to be a part of society so long as they do not attend synagogue or pray publicly or privately to G-d.” *Holmes v. California Army National Guard* 124 F.3d 1126, 1137 (9th Cir. 1997) (Reinhardt, J., dissenting). The “conduct/status distinction is ‘irrational and without substance’” *Id.* “In the end, the drafters of the regulation are trapped by their own dissembling and by their desire to avoid facing a critical issue forthrightly. The ‘compromise’ they have arrived at necessarily leads to disingenuous and arbitrary results. It will inevitably be enforced differently from base to base and will result in unfair and discriminatory treatment of many valued long-term members of the military service” *Id.* at 1139. In this make-believe scenario, gay people pretend they aren’t gay and the military goes along with the charade while acknowledging that gay people exist (out there somewhere) but certainly not within the military. Before “Don’t Ask, Don’t Tell,” “homosexuality was incompatible with service.” *Id.* at 1128. Under “Don’t Ask, Don’t Tell,” the military no longer inquires into a person’s sexual life, and “the regulations implementing the new policy stipulate that sexual orientation is considered a personal and private matter, and does not bar entry into service or continued service, unless manifested by homosexual conduct.” *Id.* Yet what one hand giveth the other taketh away because soldiers can be discharged if they engage or intend to engage in homosexual acts; make but fail to rebut a statement indicating their propensity to engage in homosexual acts; or have already consummated or attempted a marriage person of same biological sex. *Id.* Obviously, more than the manifestation of homosexual conduct matters, since even “intentions” and “propensities” to engage in homosexual conduct can lead to dismissal.

2 *Holmes v. California Army National Guard* 124 F.3d at 1137 (9th Cir. 1997) (Reinhardt, J., dissenting)

in the same way Plessy was overturned to end racial apartheid?" In Brown, the Court posed the following question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?” The Brown Court recognized education in a democratic society as “the very foundation of good citizenship,” a requirement for assuming public responsibilities. Education not only prepares students for subsequent professional training, but is also intrinsic to children’s becoming aware of cultural values and having a normal adjustment to the environment. Denying children a good education denies them success in life, the Brown Court asserted, and a good education must be made available equally to all children. Out of the Court’s solicitude for stigmatizing effects of segregation on African-American children, Justice Warren concluded: “To separate them [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Separate but equal education is not only deleterious to children but to a well functioning society.

4 See, e.g., Jack M. Balkin, Framework Originalism and the Living Constitution 103 Nw. U.L. Rev. 549, 572 (2009) (“Brown required Southern majorities to accept the constitutional values of the dominant North; Lawrence required the remaining thirteen states to decriminalize same-sex sodomy.”). This is not to apotheosize Brown, but also not to engage in “slaying the sacred cow of Brown adulation” in Monday morning quarterbacking style by examining consequences of the ruling and generating alternative scenarios had the court ruled differently, see e.g., Susan D. Carle, Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune 1880-1890 77 Fordham L. Rev. 1479, 1481 (2009). See Michael R. Belknap, The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court’s Quest for Equality 50 The Wayne Law Review 863 (2004):

The reason we should be celebrating Brown’s birthday is that it initiated a quest for equality by the Warren Court that over the next fifteen years (1954-1969) transformed and reoriented American constitutional law.

What Brown did do was eliminate all legal sanction for the American version of apartheid. After 1954 any official classification based on race that even implicitly contributed to the subordination of African-Americans was constitutionally suspect. Brown was responsible for that.

5 Brown v. Board of Education 347 U.S. at 483.
6 Id.
7 Id.
8 Id.
9 Id.
individuals is to limit their liberty in defining intimate and private sexual relationships. The *Lawrence* court focused on the penumbra of privacy inferred from the Fourteenth Amendment’s Due Process Clause: “We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”

Justice Kennedy’s opening comments spoke to the exclusion of the state in private places as fundamental to the American tradition, which constituted the fulcrum of the opinion of the court. While acknowledging the stigma of the criminal offense (of sodomy) on those convicted of this offense, Justice Kennedy attacked the reductionism in *Bowers v. Hardwick* (which cast the issue as a wholly a sexual one) and re-casted it in terms of the liberty to engage in private conduct in a private place without government intrusion:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

In her *Lawrence* concurrence, Justice O’Connor invoked the Equal Protection Clause of the 14th Amendment. Citing *Plyer v. Doe* and *Cleburne v. Cleburne*, Justice O’Connor discerned

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11 *Lawrence*, 539 U.S. at 564.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

*Id.* at 562.

12 *Bowers*, 478 U.S. at 191.

13 *Lawrence*, 539 U.S. at 567.

14 *Id.* (O’Connor concurring)

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas sodomy law is targeted at more than conduct.

A law branding one class of persons as criminal solely based on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court’s judgment that Texas.
how the Texas sodomy statute stigmatized homosexuals and constituted a life-long penalty. The Texas sodomy law targeted homosexuals as a class (making it slander to call someone a homosexual); disqualified those convicted of sodomy from certain professions; and if those convicted of sodomy moved to certain states, they would be required to register as sex offenders. Neither Justice O’Connor nor Justice Kennedy made the more powerful point that homosexuals were not deviants. Also, neither Kennedy nor O’Connor debunked the notion of the deviance of sodomy, which as The Kinsey Report has shown is common among heterosexuals. Many so-called heterosexuals have partaken in homosexual acts, suggesting that sexuality is not a polarity but a continuum: “The living world is a continuum in each and every one of its

sodomy law banning deviate sexual intercourse between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

Id. at 583, 585.

15 Plyler v. Doe 457 U.S. 202 (1982). The Court overturned the Texas law denying undocumented school-age children public education. In his concurring opinion, Justice Powell averred that “[t]hese children thus have been singled out for a lifelong penalty and stigma.” Id. Following the solicitude of Brown, the Plyler court declared: “The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation” Id. Justice O’Connor’s asserted that “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause” Lawrence, 539 U.S. at 578 (O’Connor, concurring). Rational basis review was actually “insufficient” because of the deep contradictions in §21.06: (1) heterosexuals who express moral disapproval of homosexuals are actually expressing moral disapproval of themselves (inasmuch as they partake of the same sexual activities as homosexuals, as stated in §21.06); (2) thus the liberty to engage in sodomy is already exercised by heterosexuals; and (3) the opprobrium on sodomy, the badge of inferiority worn by homosexuals, must either be extended to or removed from all engagers of sodomy, regardless of sexual orientation.

16 Cleburne v. Cleburne 473 U.S. 432, 450 (1985). In this case, the Court ruled that while not a quasi-suspect class, the mentally challenged incurred invidious discrimination: “The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.”

17 Lawrence, 539 U.S. at 584 (O’Connor, concurring).

18 Id., 583, 581.

19 ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) and ALFRED C. KINSEY ET AL., STAFF OF THE IND. UNIV. INST. FOR SEX RESEARCH, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953). This is in no way to suggest the Kinsey’s methodology and findings were above reproach, for example, his claim to total objectivity and resultant reduction thereof and flaws in statistical sampling, see e.g., Vern L. Bullough, Alfred Kinsey and the Kinsey Report: Historical Overview and Lasting Contributions 35 The Journal of Sex Research 127, 130(1998):

Although Kinsey prided himself as an objective scientist, it was his very attempt to establish a taxonomy of sexual behaviors-treating all activities as more or less within the range of human behavior—that got him into trouble. Karl Menninger, for example, said that “Kinsey’s compulsion to force human sexual behavior into a zoological frame of reference leads him to repudiate or neglect human psychology, and to see normality as that which is natural in the sense that it is what is practiced by animals. . . .”

Kinsey is also criticized for his statistical sampling. Although his critics (even before his studies were published) attempted to get him to validate his data with a random sample of individuals, he refused on the grounds that not all of those included in the random sample would answer the questions put to them and that, therefore, the random sample would be biased. It is quite clear that Kinsey’s sample is not random and that it overrepresents some segments of the population, including students and residents of Indiana. Part of the criticism, however, is also due to the use and misuse of the Kinsey data without his qualifications. This is particularly true of his data on same sex relationships, which are broken down by age and other variables and therefore allowed others to choose the number or percentage of the sample they wanted to use in their own reports.
aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.”

In the final analysis, Lawrence did not create a special liberty for homosexuals, but allowed homosexuals to exercise the same liberty afforded to heterosexuals.

Furthermore, the ruling did not challenge the deeply embedded but empirically false legal concept of the so-called crime against nature. If this assumption entails that human beings are acting contrary to how other animals act, it is sadly mistaken, as recent works in biology have clearly shown the abundance of homosexual, bisexual, and transgender activity in the animal kingdom. The stigma remains on homosexuals until their sexual actions can be seen not as deviant, but as representative of common human and animal activity. In his dissent in Schochet v. State of Maryland (1987), Judge Wilner maintained that “public morality” must be ascertained and not simply presupposed and that “there has to be some evidence of what that public morality is; the term itself cannot supply the fact.” Sodomy, Judge Wilner asserted, has become the norm: “The fact is that public morality, to the extent documented, condones rather than condemns this activity, and the degree of condonation has not only dramatically increased over the past 40 years but is approaching universality, at least among married couples. The conduct, in other words, is no longer regarded by the people as unnatural, or perverted, or unorthodox.”

The opinion of the Lawrence court was strong when it pertained to human dignity in its most general and abstract terms, but weak because it never quite removed the deviant tag from homosexuality. The full stigma against homosexuality can only be removed and the authentic dignity of queer people affirmed by recognizing sodomy as common to human sexual behavior.
Sodomy is part and parcel of acceptable diverse sexual practices, pertaining not just to homosexual but to human sexuality and not as peripheral perversity.

In *Sexual Politics, Sexual Communities*, John D’Emilio identified three major facets of gay stigmatization, via religion, law, and the medical profession:

A society hostile to homosexual expression shaped the contours of gay identity and the gay subculture. In the Judeo-Christian tradition, homosexual behavior was excoriated as a heinous sin, the law branded it a serious crime, and the medical profession diagnosed homosexuals as diseased. Together, they marked gay people as inferior—less moral, less respectable, and less healthy than their fellows.  

The stigmatization of homosexuality was mitigated to some degree when the American Psychiatric Association removed homosexuality from its list of mental disorders and state after state repealed its sodomy laws. The stigmatization has also been somewhat mitigated because a vaginal intercourse would be punished. The result would be to reach all the independent harms associated with sex acts - public sex, sex with children, sex for hire, rape, etc. These acts could and would be punished, but the unique punishment for the ‘crime against nature’ would not survive. The better approach would be to repeal the ‘crime against nature’ and, if necessary, to amend or enact statutes dealing with public sex, sex with children, sex for hire, etc., so that the crime would include oral and anal as well as vaginal sex and be punished in the same way.

*Id.* at 221.


27 See *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II, 6th Printing*, page 44 Position Statement Retired. APA Reference Document 730008, http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf (accessed 30 November 2009). An often-invoked landmark for queer liberation, the document in which this excision appears includes a number of disclaimers. The American Psychiatric Association observed that since many homosexuals were happy with their sexual orientation and could function effectively within society:

> For a mental or psychiatric condition to be considered a psychiatric disorder, it must either regularly cause subjective distress, or regularly be associated with some generalized impairment in social effectiveness or functioning. With the exception of homosexuality (and perhaps some of the other sexual deviations when in mild form, such as voyeurism), all of the other mental disorders in DSM-11 fulfill either of these two criteria. (While one may argue that the personality disorders are an exception, on reflection it is clear that it is inappropriate to make a diagnosis of a personality disorder merely because of the presence of certain typical personality traits which cause no subjective distress or impairment in social functioning. Clearly homosexuality, per se, does not meet the requirements for a psychiatric disorder since, as noted above, many homosexuals are quite satisfied with their sexual orientation and demonstrate no generalized impairment in social effectiveness or functioning.

*Id.*

Assuming heterosexuality as the optimal type of sexual functioning and homosexuality as a mental illness because it failed to function at this ultimate state, inadvertently widens the scope of mental illness to include many people who fail to function optimally:

However, if failure to function optimally in some important area of life as judged by either society or the profession is sufficient to indicate the presence of a psychiatric disorder, then we will have to add to our nomenclature the following conditions: celibacy (failure to function optimally sexually), revolutionary behavior (irrational defiance of social norms), religious fanaticism (dogmatic and rigid adherence to religious doctrine), racism (irrational hatred of certain groups), vegetarianism (unnatural avoidance of carnivorous behavior), and male chauvinism (irrational belief in the inferiority of women).” However, the APA clearly announced that the removal of homosexuality from the list of psychiatric disorders did not entail “that it is ‘normal’ or as valuable as heterosexuality.
number of well known people have come out (celebrities like Ellen DeGeneres, Rosie O’Donnell, Elton John, and Billie Jean King) and as openly gay people are being elected, for example, Houston recently elected its first openly gay mayor, Chapel Hill, North Carolina elected a gay mayor, and many other gay people won seats as city council members. While there are many religions that refuse to marry homosexuals, there are an increasing number that do. Yet this stigma cannot be fully removed until the badge of inferiority (the mark of infamy, disgrace, reproach) is eradicated such that all parties are seen to be participating in a shared humanity in which the sexual orientation and gender identity are seen as diverse and protean. Until this happens, a bipolar sexual architectonic will continue to impede homosexuals from achieving full citizenship, for example, not being able to get married and have the 1,138 rights and responsibilities that married heterosexuals presently possess and in 29 states’ being able to be legally discriminated against “based on sexual orientation, and in 38 states to do so based on gender identity or expression.” As a result, LGBT people face serious discrimination in employment, including being fired, being denied a promotion and experiencing harassment on the job. Like Brown, McLaughlin v. Florida and Loving v. Texas deny separate but equal and affirm integration. Lawrence welcomed homosexuals into a larger tent of acceptable sexual practices but, as Justice Scalia declaimed, without establishing homosexuality as a fundamental right. In the same way Brown established a new interracial social pattern in education, McLaughlin established a new interracial sexual pattern in non-marital relationships, and Loving established a new interracial social pattern in marital relationships, so Lawrence established a new sexual social pattern in non-marital relationships among consenting adults. In Lawrence,

Id.

The APA specified that “they [were] in no way be aligning ourselves with any particular viewpoint regarding the etiology or desirability of homosexual behavior” and that the “revision in the nomenclature provides the possibility of finding a homosexual to be free of psychiatric disorder, and provides a means to diagnose a mental disorder whose central feature is conflict about homosexual behavior” id. Still rooted in heteronormative belief that some queer folk can be changed, the APA concluded:

Therefore, this change should in no way interfere with or embarrass those dedicated psychiatrists and psychoanalysts who have devoted themselves to understanding and treating those homosexuals who have been unhappy with their lot. They, and others in our field, will continue to try to help homosexuals who suffer from what we can now refer to as Sexual orientation disturbance, helping the patient accept or live with his current sexual orientation, or if he desires, helping him to change it.

Id.

29 E.g., Reform and Reconstructionist Judaism, Unitarianism, United Church of Christ congregations, Quaker groups, and some Episcopalian congregations. See SEAN CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS (2004) at 14.
33 Lawrence, 539 U.S. passim (Scalia, dissenting).

Thus, while overruling the outcome of Bowers, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” Instead the Court simply describes petitioners’ conduct as an exercise of their liberty, which it undoubtedly is and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

Id. at 586 (citations deleted).
non-marital homosexual acts were de-stigmatized and seen as part of the plurality of accepted sexual acts. Yet *Lawrence* still left the impression that only homosexuals engaged in sodomy when in fact across the sexual orientation board sodomy is morally acceptable and widely practiced. That point not being made, *Lawrence* can be construed as conferring “special rights” to homosexuals for their “special activities.” Even though she recognized the intrinsic unfairness of heterosexuals being permitted to the same things that were illegal for heterosexuals, Justice O’Connor fell into the trap of distinguishing between homosexuals and heterosexuals, instead of acknowledging the commonality of sodomy to the human sexual experience: “Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treated the same conduct differently based solely on the participants. Those harmed by this law were people who had a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by §21.06.”

Not only was O’Connor’s comment errant, but it no way addressed the relationship between traditional gender roles and traditional sexual roles. Furthermore, contrast the language of *Lawrence* to the language of Justice Warren in *Loving v. Virginia*: “The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious [my emphasis] racial discriminations.” Invidious homophobia is not mentioned in either the opinion of the *Lawrence* court or the concurring opinion. “Invidious” calls attention to *Loving* and *McLaughlin* and the analogue between racism and homophobia and speaks to the ubiquity and perniciousness of the discrimination.

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34 *Lawrence*, 539 U.S. at 581 (O’Connor, concurring). So did Justice Kennedy in his use of term “lifestyle,” see n. 14 infra.


As such, same-sex sodomy is fundamentally gender transgressive, and thus opposed by the same ideology that enforces women’s gender conformity. Just as the sociolegal interdiction of same-sex sodomy was based on a desire to maintain gender roles central to the hierarchy of men over women, so same-sex marriage prohibitions express male dominance by subordinating anyone who challenges the notions of gender on which such dominance relies. . . .

In other words, gender is sexualized and sexuality is deeply gendered such that sexuality affirms social understandings of gender.

36 *Loving* 388 U.S. 1, (1967). Justice Warren employed the term “invidious” six times in his brief opinion. He referred to “invidious racial discriminations,” “arbitrary and invidious discrimination,” and declared that “The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” *Id.* at 11, 8, 10. §21.06 was an invidious against homosexuals as anti-miscegenation laws were against African-Americans. In *McLaughlin*, Judge White used the term “invidious” six times as well. *McLaughlin* 379 U.S. 184. The absence of the word in *Lawrence* suggested the Court’s failure to appreciate queer people as a class subject to “extreme” or “invidious” discrimination. *McLaughlin* and *Loving* were decided in the midst of the Civil Rights movement, where finally the discrimination of African-Americans was dramatized, especially in the mass media. Thus, discrimination against African-Americans could be seen as invidious. However, discrimination against the queer community has been much more hidden and much less publicized but is nonetheless invidious. FBI data shows that over 1,000 hate crimes a year occur against people because of their sexual orientations (http://www.fbi.gov/ucr/hc2006/victims.html). According to the FBI, 98% of hate crimes due to sexual-orientation bias are perpetrated against LGBT people. In many states, it is still legal to fire people because of their gender identity or sexual orientation. The badge of second-class citizenry is worn by LGBT people as they are still seen in many circles as hyper-sexual and as preponderantly as pedophiles and as the practicing a “different lifestyle.”
This preamble is meant to illustrate that the vestiges of the traditional bipolar paradigm of sexual morality persist even in the Lawrence’s court “reputation” of Bowers and is to be contrasted with Justice Scalia’s adherence to the traditional paradigm of sexual morality. In some ways, Scalia’s dissent was more instructive than either the opinion or concurring opinion of the Lawrence court. Scalia’s dissent offered a clear picture of how a Supreme Court justice could talk the talk of neutrality and simultaneously use all the artifices at his disposal to fight the culture war. In his dissent were the germs of reactionary sexual fundamentalism that vividly illustrated the anatomy of the culture war. Scalia’s originalism is nothing more than legal constitutional fundamentalism.

The purpose of this comment is to identify and determine the function of those machinations in the culture war as well as to demonstrate their patent shortcomings. In Part I, it will examine how Justice Scalia plays the “lifestyle card,” a subtle but powerful sign of his allegiance to the far right social and political agenda. Because of the controversy of this charge, much evidence will be adduced to demonstrate that the contemporary use of the word “lifestyle” reinforces a negative connotation of a promiscuous lifestyle often associated with the myth of hyper-sexuality, suggesting gay people “recruit” vulnerable heterosexuals and widely practice pedophilia. Scalia’s use of the term reflects common usage by conservative politicians, religious leaders, commentators, and celebrities. In Part II, the three different lists of sexual offenses Scalia offered in his Lawrence dissent will be analyzed and contrasted with Justice Kennedy’s list of sexual offenses. While Judge Scalia lumped together all sexual offenses and argued that repealing sodomy laws entailed preventing drawing any distinctions between sexual offenses, Justice Kennedy distinguished consensual adult sodomy from rape, public exhibitions of sex, and prostitution. The key point examined is why rape does not make any of Scalia’s lists. Part III identifies the ways in which Justice Scalia played with originalism in order to ensure that homosexuals miss out on suspect or quasi-suspect class status. In Part IV, the appeal to ancient roots assertion as well as transnationalism are analyzed. Scalia contended that borrowing from “foreign” judicial decisions can only yield meaningless and dangerous dicta. Using the theory of comparative foreignness, abiding by laws of one’s own country and within one’s own heritage even when their rationale is no longer relevant or patently false also introduces meaningless and dangerous dicta.

The combination of the these subterfuges, I contend, make the case for Justice Scalia politicizing the issues in Lawrence and acting as an agent for far right social and religious interests. Behind the smoke screen of the grand theory of originalism, Justice Scalia practiced the judiciary activism he allegedly abhors. This comment does not give short-shrift to Judge Scalia’s long dissent in Lawrence, but labors to connect the dots so that a full picture of his subterfuge is evident. This comment takes seriously the judicial games played by Judge Scalia as an impediment to the probity of adjudication.

I. Playing the Lifestyle Card

The brightest red flag of Scalia’s politicization of the case was manifested at the conclusion of his dissent, in his usage of “lifestyle.”37 Though Scalia used the term only once in

37 In his dissent in Romer v. Evans 517 U.S. 620 (1996) (Scalia, J., dissenting), Scalia played the orientation card, using the term 15 times! On six occasions, the term has quotations marks around it to emphasize Scalia’s incredulity. Of course, this underscored the point that homosexuality was not an orientation, but a choice and as choice was no different than a person making the choice to appear nude in the town square. This is in line with the prevailing viewpoint of the social conservatives, that homosexuality is a choice and not an orientation, since orientation suggests an inherent or innate quality. An innate quality is an immutable quality and as such would qualify gay people for suspect class status. See, e.g., Conservapedia, www.conservapedia.com/
his dissent, it was like a scream on the canvas of a dark still night. If the argument is “He only said it once,” let us remember that the ballyhooed first Justice Harlan only mentioned “Chinaman” once in *Plessy* and that was enough to besmirch his dissent and to call attention to his racism. If even a lowly “Chinaman” can ride in the same car with a white person, then why not a lowly black person?

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States.

This cannot be construed as a throwaway remark by a casual racist who simply repeats the mantras of his society, but whose judicial decisions are untouched by his naïve racism. Twice, Judge Harlan voted to uphold race-based immigration policies against Chinese people and voted against the Court’s decision to uphold “birthright citizenship for a Chinese man born to non-citizen parents in the United States.”

In the denouement of his long *Lawrence* dissent, Scalia chastised his six colleagues on the court for buying into a “homosexual agenda,” by which he meant “the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.” Scalia referred to his comments in *Romer v. Evans* about the American Association of Law Schools denial of membership to any law school refusing to ban law firms that reject prospective partners on the basis of being openly practicing homosexuals. Secondly, he construed the *Lawrence* court’s rather obvious point that

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40 *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) and *Fong Yue Ting v United States* 149 U.S. 698(1893).
42 *Lawrence*, 539 U.S. at 602 (Scalia, dissenting). Scalia was under the impression that the very small but powerful gay rights movement monopolized the debate on gay marriage. This is just another myth. See Cahill, SAME-SEX MARRIAGE IN THE UNITED STATE (2004) to see anti-gay groups actually outspend gay rights organizations by a four-to-one ratio In California, for example, the Mormon Church funneled over 22 million dollars to support Proposition 8, a referendum to overturn California’s gay marriage law.
43 *Romer v. Evans* 517 U.S. at 652-653 (Scalia, dissenting).
44 *Id.* at 652-653 (Scalia, dissenting). Justice Scalia lumped homosexuals into a category with people who choose a specific political affiliation (Republicans); who choose to engage in morally objectionable acts (adultery); who choose to attend a specific prep school; who choose to be a member of a certain organization (country club); who choose to eat a particular food (snails); who choose to sexually promiscuous (womanizer); who choose to wear certain cloths (fur); who choose to hate a sports teams (the Cubs) *id.* Obviously, since homosexuality is not an orientation for Scalia but a choice, it goes under into this category. Scalia refused to see homosexuals as an oppressed class; instead, each practicing gay person is considered a disparate individual:

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real animal fur; or even because he hates the Chicago Cubs. But if the interviewer
criminalizing homosexuality invited discrimination to homosexuals in their public and private lives as a clear indication of their allegiance in the culture war. In other words, the Court’s desire to recognize the harm done by Bowers (including a criminal conviction on one’s record, notations on job application forms, registration in four states as a sex offender, and disqualification from a number of professions, for example, medicine) represented a departure from neutrality. The ideal judge must be neutral and the Lawrence court has abandoned that ideal. Yet without taking as much as a breath after espousing neutrality, Scalia aligned himself with the anti-homosexual side of the culture war, hiding behind the cloak of the majority:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

Scalia did not use the term in its original sense. “Lifestyle” was originally a technical term coined in the 1920s by psychologist Alfred Adler to describe the relationship between childhood personality traits and subsequent behavior. Its broader usage includes a public health

should wish not to be an associate or partner of an applicant because he disapproves of the applicant’s sexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: “assurance of the employer’s willingness” to hire homosexuals.

Id.

Scalia narrowed the issue to the hiring homosexuals, but took the issue out of larger context of diversity, which was evident from the 1995 AALS statement on “Statement on Diversity, Equal Opportunity and Affirmative Action”: The purpose of the AALS, as stated in the first article of its bylaws, is ‘the improvement of the legal profession through legal education’ id. Toward this end, one requirement of the bylaws is that member schools seek to have a faculty, staff and student body which are diverse with respect to race, color, and sex. . . . AALS’ commitment to equality of opportunity and diversity reflects the judgment of the member schools that these are core values in legal education and in the legal profession. The objective reaches beyond simply ensuring access to all who are qualified. It seeks to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary in order to enhance the perception of fairness in the legal system, to secure legal services to all sectors of society, and to provide role models for young people. Diversity means more, however, than expanding access to those historically underrepresented in and underserved by legal education and the legal profession. Its objective is also to create an educational community—and ultimately a profession—that incorporates the different perspectives necessary to a more comprehensive understanding of the law and its impact on society; and to assure vigorous intellectual interchanges essential for professional development. . . .

Although there has been great progress in recent decades in respect to the number of women and members of minority groups in American law schools, legal education still has a long road to travel to produce a truly diverse profession prepared to meet the needs of American society.


Lawrence, 539 U.S. at 602 (Scalia, J. dissenting).

Rather than being seen as taking up the homosexual agenda, Lawrence can be viewed from the same perspective as Justice Burger saw racial discrimination: “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Palmore v. Sidoti, 466 U.S. 429, 433 (1984). Justice Blackmun also referred to this passage in his dissent in Bowers. Bowers, 478 U.S. at 212 (Blackmun, J., dissenting).

Lawrence, 539 U.S. at 602 (Scalia, J. dissenting).

connotation (the relationship between individual choices and health risks); a political connotation (for example, conventional or mainstream versus alternative ways of living); a business connotation, as when marketers and advertisers target consumers to match products with consumer wants. Your Dictionary.com offers numerous examples of the usage of lifestyle as an adjective—for example, healthy, lavish, or nomadic lifestyles—and a noun-modifier, for example, rock n’ roll, playboy, vegan lifestyles. Used as a noun, lifestyle refers to “the habits, attitudes, tastes, moral standards, economic level, etc., that together constitute the mode of living of an individual or group” and is a characteristic bundle of behaviors that makes sense to both others and oneself in a given time and place, including social relations, consumption, entertainment, and dress. The behaviors and practices within lifestyles are a mixture of habits, conventional ways of doing things, and reasoned actions.

The Oxford English Dictionary defines lifestyle as “[a] style or way of living (associated with an individual person, a society, etc.); esp. the characteristic manner in which a person lives (or chooses to live) his or her life.” Incidentally, none of the OED’s examples of usage pertain to sexuality.

Compare these lexical definitions with the highly politicized definitions promoting the typical stereotypes of homosexuals. As Jerry Falwell, founder of the Moral Majority, commented: “As a Christian I feel that role modeling the gay lifestyle is damaging to the moral lives of children.” Founder of Focus on the Family, James Dobson explained: “There is a highly coordinated international effort to redefine marriage, lower the age of sexual consent for minors, secure the rights to adoption by gays and lesbians, teach pro-homosexual concepts to elementary school children, gain control of high school and college curricula, achieve special rights regarding hiring and firing, guarantee taxpayer-funded marriage benefits for homosexuals,

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54 Id.
eliminate restrictions on military service, and pass laws that penalize and silence citizens who are morally opposed to the gay lifestyle.”

The Family Institute put it this way:

Society justly discriminates against those who steal, dog it on the job, or swindle. On the basis of public health, it justly discriminates against smokers or those who use illegal drugs. Everyone recognizes how wrong and/or injurious these behaviors are and that they need to be discouraged.

But why doesn’t the same thing happen when one’s sexual lifestyle is so defective that they are more apt to commit suicide, get assorted STDs and cancers, and not live as long?”

An article from the Christian Research Institute cut to the chase: “I believe that any unbiased reader would have to admit that homosexuality is neither a healthy lifestyle nor a natural one.”

The American Family Association Journal stated: “The video, It’s Not Gay, tells the unvarnished truth about the destructiveness of the homosexual lifestyle. Besides interviews with medical and mental health professionals, It’s Not Gay also relies on the testimonies of men and women who have left homosexuality.”

Oklahoma state legislator Sally Kern piled on: "We have the gay-straight alliance coming into our schools. Kids are getting involved in these groups, their lives are being ruined," she said. "They are going after our young children, as young as two years of age, to try to teach them that the homosexual lifestyle is an acceptable lifestyle.”

One-time president of the Family Research Council Gary Bauer maintained that gay people can escape

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59 American Family Association Journal (May 2007) http://www.afajournal.org/0307/noi.asp#gay (accessed 3 January 2010). Evidence for this negative connotation of lifestyle was not hard to come by. See, e.g., the comments of actor Clifton Davis; “It seems as though gay lifestyle has become commonplace. I have nothing against someone who is gay. They have the freedom to live their life, but in the house of God -- although He loves them in their sin -- He wants them out of it. I love my gay friends, but I would rather see them walk in accordance with the Word of God...and I sure don't want to see women kissing [women] on the air. I'm offended by it.” Jawn Murray Frankly Speaking: Actor Clifton Davis Talks Gay Lifestyle on TV, BlackVoices.com (13 January 2009) www.bvbuzz.com/2009/01/13/frankly-speaking-actor-clifton-davis-talks-gay-lifestyle-on-tv/5 (accessed 3 January 2010). The American Family Association’s boycott of Pepsi, for donating to the Human Rights Campaign (HRC) and to Parents and Friends of Lesbians and Gays (PFLAG), had a familiar ring to it: “This boycott has nothing to do with whether or not Pepsi hires homosexuals, or if homosexuals purchase Pepsi products, or how Pepsi treats its homosexual employees. This boycott is about the fact that, as a corporation, Pepsi is promoting the gay lifestyle” “Pepsi TV ad pushing gay lifestyle” American Family Association, (26 January 2009) http://action.afa.net/Detail.aspx?id=2147483698 (accessed 3 January 2010). Even when the message is seemingly positive, “lifestyle” is used negative, e.g., when Mitt Romney asserted:“I would have opposed that amendment. I don’t think the federal government has any business dictating to local school boards what their curriculum or practices should be. I think that’s a dangerous precedent in general. I would have opposed that. It also grossly misunderstands the gay community by insinuating that there’s an attempt to proselytize a gay lifestyle on the part of the gay community. I think it’s wrong-headed and unfortunate and hurts the party by being identified with the Republican party” Quotes from the first Republican debate (3 May 2007), www.freerepublic.com/focus/f-news/1828152/posts (accessed 3 January 2010).
from this destructive lifestyle: “People can get out of the homosexual lifestyle; those people exist. I spoke at their convention just a few weeks ago. There were hundreds of them, now happily married, now with families of their own. I will encourage anybody I can to get out of a destructive lifestyle. And, I don't believe a healthy society can endorse it, subsidize it, or encourage it.”\(^\text{61}\) “Lifestyle” has infiltrated legislation, e.g., a 1992 Alabama statute\(^\text{62}\) emphasizing “in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state” and a 1992 Arizona statute stating:

C. No district shall include in its course of study instruction which:
   1. Promotes a homosexual life-style.
   2. Portrays homosexuality as a positive alternative life-style.
   3. Suggests that some methods of sex are safe methods of homosexual sex.\(^\text{63}\)

Consequently, who would want these sex-crazed people in their homes as boarders or as business partners inasmuch as they would have sex in the bathrooms and try to seduce clients? And leave them around children? Everyone knows the strange and sick attraction adult homosexuals have for small children, even though all data suggests that heterosexuals are much more likely to be pedophiles than homosexuals are?\(^\text{64}\) Good, solid Americans must protect their families from the evils of predators whose lifestyle will can only lead to the destruction of the fabric of society. Of course, the big joke is that the whole notion of a gay lifestyle is chimerical.\(^\text{65}\)

The appearance of “lifestyle” in Scalia’s dissent was not a misstatement, but a carefully selected code word meant to convey his allegiance to the conservative side of the culture war. His neutrality is nothing more than most egregious mauvaise foi. To be fair, Justice Kennedy used the term once to denote “sexual practices common to the homosexual lifestyle.”\(^\text{66}\) Justice Kennedy failed to acknowledge that sodomy was not limited to homosexuals, (nor are vibrators

\(^{64}\) See Cahill, Same-Sex Marriage in the United States, at 35.
   Fourth, I object to the use of the term "gay lifestyle." Your lifestyle is what you choose to do (should you have the choice). It means whether you drive a Mercedes or a Jeep; whether you vacation in the Bahamas or hike the Grand Canyon; whether you go the opera or a rock concert. There is no "gay lifestyle." Some of us are rich; some are poor and most are in between. Some are Democrats, some are Republican and most are apathetic. Some are athletic, some are couch potatoes and most are occasional sprinters. Representative Jon Kyl has more in common, and a more similar lifestyle, with Representative Barney Frank than I do.
   There is no "gay lifestyle" there is only lesbian and gay people who live their lives just like you.

In his reelection campaign in 1992, the first President Bush distinguished between loving his grandson (assuming he was gay) and not promoting a gay lifestyle: “‘I’d love that child. I would put my arm around him, and I would hope he wouldn’t go out and try to convince people that this was the normal lifestyle.’”\(^\)\(^\text{66}\) Newsweek 24 August 1992 (available at Lexis, CLE Library ALLCLE file) (accessed 31 December 2009). His Vice President, Dan Quayle, remarked that he was raised to believe the gay lifestyle was wrong. Newsweek 7 September 1992 (available at Lexis, CLE Library ALLCLE file) (accessed 31 December 2009).

\(^{66}\) Lawrence, 539 U.S. at 578.
or dildos not exclusively used by homosexuals). The difference between how Kennedy and Scalia used “lifestyle” can be discerned by how Scalia referred to the negative attitude some Americans have to those engaging in homosexual conduct and how he introduces the notion of protecting families from this evil lifestyle. Kennedy’s emphasis on the sexual act was contrary to the more general sense of “lifestyle,” which encapsulated a plethora of human activities. While Kennedy’s use of the term could be construed as minimally pejorative by placing homosexuals into a separate class and thereby emphasizing their differences from heterosexuals instead of connoting a shared humanity, Scalia’s use of the term was maximally pejorative, playing into the social conservative connotation of the word, much the same way racism is invoked by displaying the Confederate flag and terms like “uppity,” “welfare queen,” and “articulate” (especially when applied to President Obama, in contrast to his inarticulate brethren spewing rap songs in the hood). Whereas Justice Kennedy was able on some level to rise above the homophobia of his culture (although he employed the same polarized sexual categories as Justice Scalia), Justice Scalia remained ensconced in and reveled in the polarities. “Lifestyle” reinforces a sexual apartheid between heterosexuals and homosexuals.

Even the greatest justices must rise above their upbringings and cultures to decry justice, was the case with the first Justice Harlan:

67 Vibrators are sold at Wal-Mart! Kennedy, O’Connor, and Scalia did not address the second part of §21.06, which referred to such items as vibrators and dildos. For Kennedy, their use apparently fell under the category of private consensual behavior, while for Scalia such activity fell under the umbrella of traditional morals offenses (but was not listed in any of lists of sexual offenses). This was a missed opportunity for the Lawrence court to address the polarity of so-called heterosexual and homosexual acts. It is as easy to imagine heterosexuals using these during sex as it can be for homosexuals. Instead of demonstrating the differences between heterosexual and homosexual activity, §21.06 conflated the two. This presented an opportunity to demonstrate how heterosexuality and homosexuality were not mutually exclusive, but consisted of shared practices as well as being aspects of a human sexual continuum.

68 Which is interesting because Kennedy clearly indicated that reducing homosexuality to a mere sexual act was as demeaning as reducing marriage to a sexual act. The opinion of the Court sidestepped the deeper issue of the normality of sodomy in human and animal sexual behavior. Had that been addressed, the “deviant” tag could be more fully eradicated. The remnants of homophobia remained, even in light of Justice Kennedy’s comments about liberty, much the same as the remnants of racism remain in Judge Harlan’s dissent in Plessy:

“The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty.” Plessy v. Ferguson (Harlan, J., dissenting).

The first Judge Harlan, lionized as one of the greatest justices, had checkered history with regard to his rulings on race. See Goodwin Liu, “The First Justice Harlan”: While the “just” Harlan dissented on a federal ban on racial discrimination in public accommodations.109 U.S. 3, 26 (1883) (Harlan, J., dissenting), dissented in favor of invalidating a state ban on operating a racially integrated private college211 U.S. 45, 58 (1908) (Harlan, J., dissenting), and dissented in favor of judicial deference to state health and safety regulations.198 U.S. 45, 65 (1905) (Harlan, J., dissenting), the “unjust” Harlan wrote the court’s opinion to uphold a Georgia’s school system refusal to build a high school for blacks after it had built a high school for whites 175 U.S. 528 (1899), joined in Pace v. Alabama to uphold a statute that punished interracial more severely than intraracial adultery 106 U.S. 583, 585 (1883), and voted to uphold immigration polices Pollock v. Farmers’ Loan & Trust Co. in favor of the constitutionality of Chae Chan Ping v. United States, 130 U.S. 581 (1889).
Yet even if it is wrong to treat Harlan as an oracle on civil rights, his successes and shortcomings importantly teach us how far it is possible to transcend the social understandings of one's own cultural context and upbringing. Perhaps more than any single opinion or any specific utterance, it is the total arc of Harlan's life that is his foremost legacy. So understood, it is a legacy that inspires faith that our nation and its laws can always become more enduring and just.69

This is not applicable to Justice Scalia, whose allegiance to “traditional” values cannot be overestimated, even in such disingenuous comments as these: “I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.” Nothing is more risible except his comments rationalizing his homophobia by pointing to the inaction of a largely homophobic Congress with regard to equal rights for gay people: “This law-school view of what ‘prejudices’ must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protection of civil rights.”70 All that proves is that the majority of Congress fails to see homosexuals as persons, much the same as lawmakers (and their constituents) once refused to see blacks, women, and people with disabilities as persons.

II. The Old versus New Sexual Morality:
A Funny Thing Happened to Rape on the Way to the Courtroom

Perhaps most remarkable about Judge Scalia’s dissent was his laundry list of sexual offenses. He enumerated three such lists: a more comprehensive one near the beginning of his dissent and two near the end. By examining Scalia’s laundry list as well as the laundry lists of Kennedy, it can be more easily seen the emergence of a new sexual morality has emerged in American law. In the older sexual morality of Bowers,71 it was most interesting to see what has been omitted from the list. It is also most interesting to see that when Scalia’s list and Kennedy’s list are juxtaposed that there is point of agreement with regard to sexual offenses. The omissions from Scalia’s lists are telling because they suggest that the new sexual ethics of the Lawrence court is not about “anything goes,” but about drawing new lines with respect to sexual conduct. Scalia was convinced there is no way to distinguish sexual offenses: “The impossibility of distinguishing homosexuality from other traditional morals offenses is precisely why Bowers rejected the rational-basis challenge.”72 Whether it is cultural clash between civilizations or a cultural clash within a civilization, the fault lines are similar: “It is connected with attitudes to such issues as gender equality, the right to divorce, contraception rights and abortion, and most especially the issue of homosexuality.”73 Or the combatants of the culture war can be termed the orthodox and the progressives.74 Orthodoxy entails a closed system, while progressivism entails an open system.

70 Romer v. Evans (Scalia, dissenting).
71 Like Justice Scalia, Justice White lumped together all sexual offenses: “And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.” Bowers, 478 U.S. at 195-196.
72 Lawrence, 539 U.S. at 590.
73 Michael Kirby, Sexuality and Global Forces at 489.
74 See David Koppelman, Phony Originalism and the Establishment Clause 103 Nw. U.L. Rev. 727, 731 (2009): (“Progressivism, on the other hand, tends to take human well-being as the ultimate standard by which moral
Justice Scalia claims to be an originalist. Reva B. Siegel describes the originalist “judge as a kind of amanuensis for those who adopted the Constitution.”75 Under this scenario, judges do not allow cultural values to interfere with their faithful rendition of the Constitution. They are servants who faithfully execute the orders of their masters (the Framers). Another way of looking at how originalists view the Constitution is to view them as coroners and their adjudication as autopsies. Both the amanuensis and autopsy metaphors connote a document impregnable to alteration. The orthodox perform autopsies on a dead body the characteristics of which are immutable or practically immutable, while progressives treat the Constitution like a living being, the characteristics of which are changing and must be addressed with unique responses to assist it to achieve its full potential. The orthodox ask “What made this work?” whereas progressives ask “What can be done to make this work better?” Scalia stands on one side of the fault line, Kennedy on the other. Because of the emergence of a new sexual morality and the fading of traditional sexual codes, the Lawrence court was in a position to overturn Bowers.76 The predominance of the new sexual morality allowed the Lawrence court not simply to overturn Bowers, but to “eviscerate it.”77 As an originalist, Scalia “believes that the Court should accept the policies of legislatures, as long as they do not violate the specific words of the Constitution, or cannot be directly inferred from those words” and rejects “the permissibility of the external in Court decision making moving beyond the founding periods of the Constitution and its amendments.”78 Originalists also have to decide whether it is the original words or the original expected application that is to be counted: “There is a secondary question of which understanding originalists consider authoritative. Is it the original meaning of the words of a constitutional provision or the provision's original expected application?”79

Scalia’s originalism or fundamentalism serves to concomitantly preserve Constitution and its amendments and the state laws. From this perspective, there is a written Constitution, unmalleable and fixed, rather than a living Constitution. With a living Constitution, the Amendments have penumbras, instantiations of the rights of the Amendments: “Accordingly, the Court announced that the ‘specific guarantees in the Bill of Rights have penumbras’ (or partial shadows) that give the actual wording of the Constitution ‘life and substance.’”80 Originalists are afraid of these shadows, believing they will distort the original meaning of the Constitution and its amendments. This is especially true in the latter half of the 20th century:

Americans are becoming aware that, over the past forty years, the judiciary’s increasing disregard of constitutional strictures has deprived them of the ability to answer many of the political questions that affect them most. Marriage is just one of the more recent

judgments and policy decisions are grounded, and to treat any moral truth as a human construction that is always subject to reevaluation in light of experience.”)

75 Reva B. Segal, Dead or Alive: Originalism as Popular Constitutionalism in Heller 122 Harv. L. Rev. 191, 195 (2008).
76 See Ronald Kahn, Originalism, the Living Constitution, and Supreme Court Decision-Making in the Twenty-First Century: Explaining Lawrence v. Texas 67 Maryland Law Review Md. L. Rev. 25-35 (2007): (“When changes in society and in rights principles and doctrine are symbiotic, landmark cases will not be overruled; when social constructions in prior landmark cases are no longer tenable, landmark cases are ripe for serious modification or outright overturning.”). Id. at 27.
77 Id. Had Lawrence “eviscerated” Bowers, the old sexual morality would have been superseded. It was not because the homosexual-heterosexual polarity remained.
78 Id.
79 Jamal Greene, Selling Originalism 97 Geo LJ 657, 662.
questions the judges are about to take from the hands of American voters. As a result, more than marriage is on shaky ground. So is America’s “greatest improvement on political institutions”: the idea of “a written Constitution.”

Yet Originalism is often a mask for moral fundamentalism and is abandoned when it fails to yield the desired results. Much as Elisabeth Nietzsche altered her famous brother’s manuscripts to support Nazism, so some originalists intentionally alter texts to fit their value systems: “As others have noted, the ‘originalist’ Justices are only opportunistically originalist. When original meaning does not support the result they want to reach, they tend to ignore it, making it difficult to take their professions of originalism seriously.”

Scalia has been “opportunistically originalist”: “But the function of all this scholarship in the Supreme Court is somewhat different than its authors intend: ‘originalist’ Justices opportunistically use the scholarship to attack areas of the law that they don’t like.”

From an epistemological perspective, “[t]he practices, laws, and even vocabulary familiar to the Framers often reflect a worldview very different from our own. Has the interpreter understood the circumstances of the past and applied its lessons defensibly to a modern problem?”

Originalism is dangerous because it gives the impression that constitutional adjudication is formulaic and can be practiced in “an objective and mechanical fashion.” It panders to the populist taste that wants its decisions in oversimplified sound bites and has little patience for complexity. Unfortunately, most originalism is “hard”: it preaches the gospel of its political allies; it is an orthodoxy declaring it, and it alone, is the only legitimate method to discover the actual meaning of the text; and it deems other methods absurd.

Such flaws become obvious in Scalia’s rendering of the Establishment Clause. Had Scalia been true to his originalist faith on this issue, the answer he would have come up with is that the Constitution does not give preferential treatment to any religion. In *McCreary County v. ACLU*, Justice Scalia thus envisions a role for the Court in which it decides which articles of faith are sufficiently widely shared to be eligible for state endorsement (and in which determinedly uneducable judicial ignorance is a source of law!). Evidently, the state may endorse any religious proposition so long as that proposition is - or is believed by a judge

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81 Id.
82 Koppelman, *Phony Originalism*, at 729.
83 Id.
85 Berman, *Originalism Is Bunk* 84 N.Y.U.L. 1 (2009). (“Originalism comes in many flavors; varied distinct theses are fairly described as “originalist” in tighter or looser senses.”) Id. at 8. There are some commonalities, however:

[S]elf-professed originalists are largely united: They believe that those interpreters who ought to follow some aspect of a ratified provision’s original character (regardless of whether that set be limited to judges) ought to give that original aspect priority over any other consideration. When the original meaning (or intent, or understanding, or the like) is discernible (to some generally unspecified subjective confidence level), courts (and possibly other interpreters too) must always follow it when purporting to engage in constitutional interpretation, with the sole exception (for some) that judges may act lawfully in continuing to abide by “wrong” judicial precedents.

86 Id.
unacquainted with doctrinal niceties to be - a matter of agreement between Judaism, Christianity, and Islam.\textsuperscript{88}

In his rendition of originalism in \textit{Lawrence}, the desired result for Scalia was to prevent same-sex marriage. He echoed the \textit{Bowers} court, asserting that there was no fundamental constitutional right to engage in sodomy:

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that, despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.\textsuperscript{89}

In this case, not fiddling with the Constitution gave Scalia the desired outcome, unlike in \textit{McCreary County}, when fiddling with the Establishment Clause was requisite for the desired outcome to include only Judaism, Christianity, and Islam as state-sponsored religions. When it came to the Second Amendment, Scalia in no way wanted to do an autopsy: he preferred to reanimate the Constitution according to his own conservative NRA image. In \textit{District of Columbia v. Heller}, Scalia reanimated the Second Amendment with his pro-gun inclinations: “Justice Scalia's Second Amendment protects the law-abiding citizen's ability to defend himself and his family from criminals - and not the republican vision of a militia prepared to defend against government tyranny.”\textsuperscript{90} The opportunistic originalist struck only after “[d]ecades of mobilization inside and outside the academy forged modes of interpreting the Second Amendment that make libertarian, law-and-order concerns central to its meaning and republican concerns peripheral.”\textsuperscript{91} Above-the-political-fray Justice Scalia capitalized in a change in societal

\textsuperscript{88} Koppelman, \textit{Phony Originalism} at 735.

\textsuperscript{89} \textit{Bowers}, 478 U.S. at 186. According to Justice Blackmun, the Court refused to recognize the greater principle: “the fundamental interest all individuals have in controlling the nature of their intimate associations with others,” not the “fundamental right to engage in sodomy,” was at stake. \textit{Id.} at 206. Yet Justice Blackmun still casted the issue in terms of “giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals make different choices.” \textit{Id.} at 205-206. Yet the issue is not about pluralism, but of finally admitting that heterosexuals and homosexuals routinely engage in sodomy. Justice Blackmun supported his supposition by appealing to Wisconsin v. Yoder 406 U.S. 205, 223-224 (“A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”) Such a sentiment, though well intended, casts gays in the role of the Other. Blackmun argued for privacy on the basis of the basis of “tolerance of nonconformity”:

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, \textit{cf. Diamond v. Charles}, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently. . . .

I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.

\textit{Ibid.} at 213-214 (citations omitted).

\textsuperscript{90} Reva B. Siegel, \textit{Dead or Alive}, at 239.

\textsuperscript{91} \textit{Ibid.}, at 239.
ideology to reanimate the Second Amendment in the image of conservative social values, an “emerging awareness,” just as Justice Kennedy had done in Lawrence.

In Lawrence, Scalia’s agenda was to ignore the “emerging awareness” to which Justice Kennedy referred. Instead of espying the changing tide of sexual morality, he closed his eyes to it and instead latched onto “fundamental rights” angle. Bowers announced no fundamental right to sodomy and Scalia declaimed the same sentiments and reinforced the same conservative ideology. “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.” Scalia asserted, “are likewise sustainable only in light of Bowers validation of laws based on moral choices.” Lawrence called into question the validity of all sexual offenses: “Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.” Before addressing Scalia’s first list, a word must be said about Scalia’s “cabining the scope” comment. It is patently true that Lawrence challenged the legitimacy of sexual morals offenses, but the challenge was not the excision of them but of drawing new lines and suggesting how to draw new lines. Populist Scalia espoused a tyranny of morality, presenting it in terms of rational-basis review and state rights jingoism. The tyranny of morality consists of allowing morality to be used without question, without justification. Unreflective viewpoints become law. This includes using the line “That was the way I was raised, as when General Peter Pace justified “Don’t Ask, Don’t Tell”:

My upbringing is such that I believe that there are certain things, certain types of conduct that are immoral. I believe that military members who sleep with other military members’ wives are immoral in their conduct, and that we should not tolerate that. I believe that homosexual acts between individuals are immoral, and that we should not condone immoral acts.

In contrast, Justice Kennedy intimated what belonged in the cabin of sexual offenses and their differentiation from homosexual sodomy:

**KENNEDY’S LIST**

- Adult Sex with Minors
- Injury to Participants
- Coercion (rape)
- Unavailability of Easy Consent (Sexual Harassment?)
- Public Conduct
- Prostitution
- Same-Sex Marriage

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92 Lawrence, 539 U.S. at 572; id. at 590, 597, 598 (Scalia, dissenting).
93 Id. at 590 (Scalia, dissenting).
94 Id. at 590.
95 Id., at 603 (“But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”).
96 “Top U.S. General Calls Homosexuality ‘Immoral,’ Compares to Adultery” Think Progress http://thinkprogress.org/2007/03/12/pace-homosexuality-immoral/
97 Lawrence, 539 U.S. at 578.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.
For Justice Kennedy, there existed a rationale for separating private and consenting acts of sodomy from sexual crimes. Expanding Scalia’s cabin metaphor, there are two cabins: one in which private consensual adult sexual relationships are legal and another in which coerced, public, coerced, age inappropriate sexual acts are deemed illegal. In Scalia’s orthodox originalist legal world in *Lawrence*, sexual offenses are confined to one cabin and any changes in this list (for example, if what once an offense is no longer considered an offense and is removed from the list) destroy the meaning of sexual offenses. In Kennedy’s world, distinctions could be made and homosexual sodomy could be separated out from sexual offenses without destroying the cabin of sexual offenses.

In an effort to attain more clarity, Scalia’s four lists of sexual offenses are laid out below and subsequently Scalia’s list (with no redundancies) and Kennedy’s list will be juxtaposed and assessed:

<table>
<thead>
<tr>
<th>SCALIA’S FIRST LIST</th>
<th>SECOND LIST</th>
<th>THIRD LIST</th>
<th>FOURTH LIST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bigamy</td>
<td>___________</td>
<td>Bigamy</td>
<td>___________</td>
</tr>
<tr>
<td>Same-Sex Marriage</td>
<td>___________</td>
<td>Homosexual Marriage</td>
<td></td>
</tr>
<tr>
<td>Adult Incest</td>
<td>Adult Incest</td>
<td>Adult Incest</td>
<td>Adult Incest</td>
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<tr>
<td>Prostitution</td>
<td>Prostitution</td>
<td>___________</td>
<td>___________</td>
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<tr>
<td>Masturbation</td>
<td>___________</td>
<td>Adultery</td>
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<td>Adultery</td>
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<td>Adultery</td>
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<tr>
<td>Fornication</td>
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<td>Bestiality</td>
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<td>___________</td>
<td>Obscenity</td>
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<td>___________</td>
<td>___________</td>
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<tr>
<td>_________</td>
<td>_________</td>
<td>Child Pornography</td>
<td>Sodomy</td>
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<tr>
<td>_________</td>
<td>_________</td>
<td>___________</td>
<td>Sodomy</td>
</tr>
</tbody>
</table>

The longest list, List 1 included everything in the shorter Lists 3 and 4. List 2 included child pornography and sodomy, not mentioned in either of the other lists. Adultery and adult incest are the only sexual offense to appear in each of the four lists.

Contrary to Justice Scalia’s assertion that these sexual offenses cannot be differentiated, legal differences can be drawn between same-sex sodomy between consenting adults in a private domain and other morals offense. Since same-sex sodomy between consenting adults in a private domain does not involve marriage, it is different from bigamy and from same-sex marriage. Since Lawrence repealed sodomy laws and not incest laws, it does not involve incest (sodomy is not incest). Prostitution consists of payment for sex and is different from same-sex sodomy between consenting adults not making that exchange (add to the fact that prostitution is often heterosexual in nature). Auto-eroticism pertains to one party, not two. Adultery pertains to marriage, which the *Lawrence* ruling does not address. Sex between parties not married to each other is legalized by Lawrence, but that practice is hardly on offense in the 21st century. Bestiality pertains to an interspecies relationship in which one of the parties is unable to give or not give consent. Furthermore, it is ridiculous to assert, for example, that auto-eroticism and rape

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98 Id. at 590 (Scalia, dissenting).
99 Id. at 599.
100 Id. at 598.
101 Id. at 600.
have the same moral opprobrium. Auto-eroticism is truly a victimless crime and rape is one of
the violent and sadistic acts that can be perpetrated. Equating them is tantamount to equating
assault and battery with jaywalking. This is further reason to reject Scalia’s cabining plan.
Furthermore, since Lawrence was applicable to private, not public, sexual acts, obscenity was
not an issue. Child pornography involves participation of a minor, which Lawrence does not
legalize. Sodomy laws, of course, were what Lawrence repealed, but only between consenting
adults in privates places. This stipulation was made clear in the Court’s list of sexual offenses,
which will now be compared with Scalia’s streamlined list:

<table>
<thead>
<tr>
<th><strong>SCALIA’S LIST</strong></th>
<th><strong>KENNEDY’S LIST</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Bigamy</td>
<td>Same-Sex Marriage</td>
</tr>
<tr>
<td><em>Same-Sex Marriage</em></td>
<td></td>
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<tr>
<td>Adult Incest</td>
<td>Prostitution</td>
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<td><em>Prostitution</em></td>
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<td>Masturbation</td>
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<td>Adultery</td>
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<td>Bestiality</td>
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<td>Obscenity</td>
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<tr>
<td>Child Pornography</td>
<td></td>
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<tr>
<td></td>
<td>Adult Sex with Minors</td>
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<td></td>
<td>Injury to Participant</td>
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<tr>
<td></td>
<td>Coercion (rape)</td>
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<tr>
<td></td>
<td>Unavailability of Easy Consent (Sexual Harassment?)</td>
</tr>
<tr>
<td></td>
<td>Public Conduct</td>
</tr>
</tbody>
</table>

The only overlapping items on the list: same-sex marriage and prostitution. The fact that these
lists were so different because Scalia’s list represented the voice of the old sexual moral code
whereas Kennedy’s represented the voice of the new sexual moral code. According to the old
code, sexual offenses need not be justified. Once a sexual offense, always a sexual offense, and
the bundle of sexual could not be disentangled without unraveling the whole spool. Kennedy
discerned among the sexual offenses. Sexual acts between consenting non-married gay adults in
private can be disentangled from the bundle of sexual offenses and a rather clear legal line can be
drawn that and other so-called morals offenses.

Scalia’s house of cards argument consisted of this: if homosexuality was no longer
lumped into the category of sexual offenses, then all sexual offenses would lose their moral
force. This is the classic slippery slope argument. 102 By the same token, there was once a time

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102 See Ruth E. Steinglantz, *Raining on the Parade of Horribles: of Slippery Slopes, Faux Slopes, and Justice Scalia’s Dissent in Lawrence v. Texas* 153 UPENN Law Review, 1097 (2005). (“Justice Scalia, writing in dissent, warned that Bowers was a necessary barrier to the invalidation of numerous state laws regulating morals offenses and that Lawrence was, therefore, the first step onto a slippery slope that would lead courts to legalize a parade of sexual-conduct horribles.”) Id., at 1098. Steinglantz elaborates:

The offenses in Justice Scalia's parade of horribles were no more likely to be held unconstitutional today than they were a year ago, when only heterosexual status carried the privilege of sexual privacy.
when women couldn’t vote and after 1920 they could vote. This did not mean that children or non-citizens could vote. It just opened up voting to another class, not to everybody. *Lawrence* opened up sexuality to non-marital homosexual participation, but drew lines to exclude a number of sexual practices. Thus, the house of cards does not fall because the card is not essential to the house’s primary structure.

Consent and the adult status of the participants became the core of the new sexual morality. And this was where Justice Scalia remained silent. His silence was clearly indicated by the fact he did not include rape among any of his three lists of sexual offenses. While he included adult incest on all three of his lists, he failed to include adult-child incest, a sexual offense involving a minor and from which Judge Kennedy demonstrated the core of this new sexual ethics was already embedded in American law. The exclusion of rape from any of Scalia’s lists was characteristic of social conservatives to ignore issues that have to do with women’s rights, whether they be reproductive, economic, or criminal rights. Rape is much more of an issue in American law than sodomy was and in contrast exploitative. Rape did not fit well into Scalia’s cabin, where everything is inextricably intertwined. In the new sexual morality,

Broadening that right to include gay men and lesbians bas not set the Court on the libertarian slippery slope that so infuriates Justice Scalia; on the contrary, it serves to level the slope that led courts to elide “homosexual” and “criminal.” To put this another way: Justice Scalia warns that *Lawrence’s* expansion of the fundamental right to sexual privacy is the first step along a slippery slope that will make it impossible for states to criminalize other private sexual acts. In fact, however, because this case turns on a question of status, I would argue that the fundamental right to sexual privacy is unchanged per se. It still is the right of two (and not three or four or seven) consenting (and not coerced by any physical or emotional means) non-consanguine (and not siblings or parent and child) adults (and not an adult with a child or an adult with an animal) to choose to engage in a private, sexual relationship. All that is changed is that the definition of “adult” has been read to include all adults, irrespective of sexual orientation.

*Id.* 1119-1120.

*Lawrence,* 539 U.S. at 569:

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, supra, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

*See* Martha McCaughey, REAL KNOCKOUTS: THE PHYSICAL FEMINISM OF WOMEN’S SELF-DEFENSE 65 (1996), as quoted by Holly Henderson, Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention 22 Berkeley J. Gender L. & Just. 225, 252(2007). (“This is precisely why rape is harmful and worth fighting against: It reduces a woman's mode of being-in-the-world from an absorbed lived body to a broken body with a self somewhere else or a self reduced to a body-thing. Women are regarded by men who rape (and, regrettably, by many others) as things, void of a moral will or a body-self distinct from the rapist's, or they are reduced to his (mis)interpretation.”) In contrast to the thousands of reported rapes every year (according to RAINN, Rape, Abuse, & Incest National Network, 248,000 in the United States were victims of sexual assault), Scalia can barely dig up any prosecutions of sodomy: “There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880—1995” *Lawrence,* 539 U.S. at 594 (Scalia, dissenting).

*Inasmuch as rape is a “woman’s issue” and has been brought to light by the feminist movement, it was not included in Scalia’s patriarchal cabin of sexual offenses. Rape does not simply indict largely male perpetrators, but indeicts patriarchy. Thus, Scalia omitted rape for ideological reasons as well for a practical reason (as a clear demarcation of lawful and unlawful sexual behavior). One of the most glaring indications of the conservative
coerced sexual acts are morally wrong and easily distinguished it from other sexual offenses. Nor
does adult-child incest fit into Scalia's cabin, a conservative cabin that is pro-life and anti-
abortion and failed to explicate illicit relationships between adults and minors. The inclusion of a
minor in the act distinguishes it from consensual non-marital homosexual relationships. But the
law admits of distinctions and Lawrence does not pave the way for a sexual free-for-all, but
refined moral distinctions when it comes to sexual offenses.

III. Refusal to Give Heightened Scrutiny to a Non-Class

Scalia was neither paranoid nor guilty of the slippery slope fallacy when he asserted that
Lawrence was a gateway to gay marriage, contrary to the majority claim that the decision did not
sanction same-sex marriage:
Do not believe it. More illuminating than this bald, unreasoned disclaimer is the
progression of thought displayed by an earlier passage in the Court’s opinion, which
notes the constitutional protections afforded to .personal decisions relating to marriage,
procreation, contraception, family relationships, child rearing, and education, and then
declares that [p]ersons in a homosexual relationship may seek autonomy for these
purposes, just as heterosexual persons do. Ante, at 574 (emphasis added). Today’s
opinion dismantles the structure of constitutional law that has permitted a distinction to
be made between heterosexual and homosexual unions, insofar as formal recognition in
marriage is concerned.106

It is, much as McLaughlin was gateway for interracial marriage in Loving. Sagely, Scalia never
invoked McLaughlin and frankly he could not, for it would undermine his agenda. For if he did,
he would help introduce an analogue that would surely add fuel to the fire to those advocates of
the homosexual agenda who could more easily bridge the gap between the illegality of interracial
non-marital and marital relationships and same-sex non-marital and marital relationships.
Skirting McLaughlin, Scalia could unequivocally reject same-sex non-marital and marital
relationships:
To be sure, §21.06 does distinguish between the sexes insofar as concerns the partner
with whom the sexual acts are performed: men can violate the law only with other men,
and women only with other women. But this cannot itself be a denial of equal protection,
since it is precisely the same distinction regarding partner that is drawn in state laws

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insensitivity to rape occurred recently when thirty Republicans voted against the Franken Amendment, which would
punish contractors who deter their employees from taking sexual assault, battery, and assault cases to court. The
legislation arose from the gang-rape of KBR employee Jamie Leigh Jones, who was detained in a shipping container
for 24 hours and was threatened with dismissal if she left Iraq for medical treatment. (Faziz Shakir, “Franken Wins
Bipartisan Support For Legislation Reining In KBR’s Treatment Of Rape,” Think Progress 7 October 2009
(http://thinkprogress.org/2009/10/07/kbr-rape-franken-amendment/) Surveying what socially conservative groups
declare the major social issues, it can be seen rape or violence toward women makes none of the lists. Rape does not
appear on the radar of the conservative social agenda. For example, Focus on the Family identifies a number of
social issues (including abstinence, abortion, euthanasia, stem cell research, school choice, separation of church and
state, pornography, and same-sex attraction), but makes no mention of rape (even when it addresses to
pornography). Family Research Council identifies the following social issues: abstinence and sexual health,
homosexuality, abortion, euthanasia, stem cell research, family structure, religious liberty, pornography, and judicial
activism. The social issues identified by Americans United for Life include abortion, legal recognition of the unborn
and born, end of life, and rights of conscience. Rape is not on the radar screen of conservatives as an issue of prime
importance, which is another indicator of Scalia’s allegiance.

106 Lawrence, 539 U.S. at 604 (Scalia, J., dissenting).
prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.\textsuperscript{107}

Neither the rights of men nor women (classes that Scalia recognizes) were denied. Only homosexuals were denied these rights, but not as a class. Homosexuals have chosen their predicament, much as jaywalkers, extortionists, arsonists, and genocidal maniacs have made choices. Homosexuals are to be included in the group of crime choosers. If people are born “that way,” then they are oriented toward certain behavior and those oriented in “that way” can more easily pronounce themselves a class. Scalia desperately wanted to prevent this classification from occurring. As John D’Emilio contends, the first goal of early gay activists in America was to transform the conception of homosexuals as aberrant individuals to an oppressed class:

Homosexuals, too, were trapped by false consciousness, by a hegemonic ideology that labeled their eroticism as individual aberration. The first task of a homosexual emancipation movement, then, was to challenge the internalization of this view by homosexuals and to develop among gay populations an awareness of its status as an oppressed minority. . . .

The purpose of the society . . . was to unify isolated homosexuals, educate homosexuals to see themselves as an oppressed minority, and lead them in a struggle for their own emancipation.\textsuperscript{108}

Since he never deemed queer people a suspect or quasi-suspect class, Justice Scalia could justify using unjust laws to justify other unjust laws. §21.06 was perfectly justified by the Texas law that prohibited same-sex marriage.\textsuperscript{109} The larger prohibition against same-marriage was an umbrella under which same-sex relationships outside of marriage stood. §21.06 did not pertain to all people, as Scalia claimed, even “on its face.”\textsuperscript{110} Scalia conceded that §21.06 can only be violated by homosexuals, not heterosexuals.\textsuperscript{111} Yet this distinction did not violate the equal protection because it is precisely the same distinction drawn in the prohibition of same-sex marriage: The law wasn’t about men, women, heterosexuals, and homosexuals being subject to the same law. This is like saying miscegenation laws affected males, females, blacks, and whites equally. However, the affected classes were not males, females, blacks, and whites, but those whites who wished to marry blacks. It is this class that is affected and to which the law pertained.

Justice Scalia deflected the possible objection to his refusal to suspect or quasi-suspect status to queer people by introducing \textit{Loving v. Virginia} as a counterpoint to his position. In \textit{Loving}, he remarked, heightened scrutiny superseded rational-basis review because the Virginia law maintained white supremacy.\textsuperscript{112} Once this was admitted, the next logical step was never taken, to at least acknowledge that gay people were a suspect or quasi-suspect group. The next logical step would have been to see the heightened scrutiny superseded rational-basis review in \textit{Lawrence} because the Texas law maintained heterosexual supremacy: “Congress faces an uphill battle in protecting groups or rights subject to rational basis review.”\textsuperscript{113} Yet the legal territory covered by heightened scrutiny is small: “The Court utilizes heightened scrutiny to protect only a

\begin{footnotes}
\footnotetext{107}{\textit{Id.} at 599-600.}\\
\footnotetext{108}{D’Emilio, \textit{SEXUAL POLITICS, SEXUAL COMMUNITIES}, at 66-67.}\\
\footnotetext{109}{\textit{Lawrence}, 539 U.S. at 600 (Scalia, dissenting).}\\
\footnotetext{110}{\textit{Id.}, at 599.}\\
\footnotetext{111}{\textit{Id.} at 599-600.}\\
\footnotetext{112}{\textit{Id.} at 600.}\\
\footnotetext{113}{Jennifer L. Greenblatt, \textit{Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal} 421 Florida Coastal Law Review 13451 (2009).}
\end{footnotes}
narrow subset of constitutional rights and governmental powers.”

Perhaps Scalia’s argument is rooted in the immutability criterion:

Though many have argued against the requirement of immutability for equal protection, courts have continued to refer to immutability as a necessary prerequisite to suspect classification. Similarly, though many have acknowledged the historical and social inequities faced by the gay community, few courts have actually included sexual orientation within their list of suspect traits given heightened scrutiny.

The absence of heightened scrutiny gives a green light to the state to continue its discrimination: “The Supreme Court’s application of heightened scrutiny to some classes and not others without evident justification does not merely leave unprotected groups in no worse a situation; it positively validates the state’s discrimination against them by denying the relevance of the very class characteristics that may have provoked the discrimination in the first place.”

Justice Scalia refused to admit was that “some rights, though not fundamental, are a core expression of one’s identity and integral to society’s perception of that person, as well as the individual’s self-perception.” Sexual orientation and gender identity fit in that category. The criteria for determining a suspect group include the history of discrimination against the group, the group’s political power, the immutability of the trait characteristic of the group, and whether the characteristic prevents a group member from performing in society.

Justice Scalia type-casted the homosexual minority as strong and vigorous and not in need of assistance. More than that, he regarded the homosexual minority as a threat to the majority, a bully on the playground:

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, see ibid.; App. 254 (affidavit of Prof. James Hunter), and of course care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

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114 Ibid.
115 California Supreme Court Declares Prohibition of Same-Sex Marriages Unconstitutional. - In Re Marriage Cases, 183 P. 3d. 384 (Cal. 2008) 122 Harv. L. Rev. 1557, 1561 (2009). The California Supreme Court has three criteria for heightened scrutiny:

In their general equal protection jurisprudence, California's state courts have traditionally held that characteristics granted heightened scrutiny as suspect classifications must: (1) carry a historical stigma of inferiority and second-class citizenship, (2) bear no effect on one's ability to perform or contribute to society, and (3) be immutable. Under that test, the Court of Appeal acknowledged sexual orientation's satisfaction of the first two requirements, but refused to grant suspect classification based on the inconclusive proof of immutability.

Id. 1561-1562.
118 Id. at 1413.
Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.\textsuperscript{120} The gays run the law profession. The gays are rich. The gays aggressively push their agenda. Scalia’s comments are reminiscent of anti-Semitic comments that the Jews run the world, which runs counter to the 2,000 year history of the oppression of Jews and the horror of the Holocaust and servitude in many countries, including in Russia and the former Soviet Union.\textsuperscript{121} “Moreover, such conclusions [Scalia’s] ignore the fact that these successes - when they exist - are recent, hard-fought, narrowly won, and are often times subsequently reversed through the same political process.”\textsuperscript{122} For example and quite recently, California and Maine abolished equal marriage.

But Scalia denied the systematic oppression of a group of loosely associated individuals could qualify as a suspect class. Per Bowers, Scalia persisted in his class warfare against homosexuals, refusing to attribute oppressed class status to people who are not innately oriented toward but choose certain behavior. His likening of homosexuals to nudists accentuated his predilection toward de-classifying queer people (of excluding them from heightened scrutiny status) and equating them with another fringe group behaving badly trivialized the issue:

Of course the same could be said of any law. A law against public nudity targets the conduct that is closely correlated with being a nudist, and hence is targeted at more than conduct.; it is directed toward nudists as a class. But be that as it may. Even if the Texas law does deny equal protection to homosexuals as a class, that denial still does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.\textsuperscript{123}

The window through which to grasp Justice Scalia’s denial of suspect class is McLaughlin. As Ariella Dubler points out, McLaughlin and Lawrence share similarities: in both cases, the Court protects non-marital relationships in situations in which the couples could not legally marry and commentators saw the cases as springboards to marriage.\textsuperscript{124} Yet the crucial similarity is that in both cases, the Court recognized a class of sexual relationships previously excluded from a class of acceptable sexual practices. In McLaughlin, the Supreme Court struck

\textsuperscript{120} Lawrence, 539 U.S. at 602 (Scalia, dissenting).

\textsuperscript{121} See EDWARD H. FLANNERY, THE ANGUISH OF THE JEWS (1985), 192. (“They [Protocols of the Elders of Zion] comprise a motley array of supposed examples of secret Jewish domination in history and plans for the future, including methods of stupefying Gentiles, controlling the press, finance, and government.”)

\textsuperscript{122} Ewing, Tiered Equal Protection, at 1425-1426.

\textsuperscript{123} Lawrence, 539 U.S. at 602 (Scalia, J. dissenting).


McLaughlin and Lawrence share a number of notable features. As it did in McLaughlin, the Supreme Court in Lawrence extended constitutional protection to certain nonmarital, intimate relationships—in Lawrence, same-sex relationships. And, just as McLaughlin and Hoffman could not have formally married in Florida when the Court decided McLaughlin, the Lawrence Court extended constitutional protection to same-sex intimacy at a time when the couple in question, John Geddes Lawrence and Tyron Garner, could not have married under any state marriage laws, all of which restricted marriage to cross-sex couples. Finally, like McLaughlin, Lawrence was immediately perceived by many commentators along all points on the political spectrum as a temporary constitutional resting place for those fighting to broaden the right to marry. In other words, just as McLaughlin has long been understood as a rest stop on the road to a constitutional right to interracial marriage, so too Lawrence has been seen by many as a rest stop on the road to a constitutional right to same-sex marriage.

\textit{Id.} 1165.
down a Florida law prohibiting non-marital interracial opposite-sex cohabitation. The Court pointed to an invidious distinction that cannot be held. In *Pace v. Alabama*, the Supreme Court upheld an Alabama law prohibiting white-black cohabitation and rejected appeals to the 14th Amendment. Since the law applied to whites and blacks equally—no person in either race could marry a person in the other—it abided by the 14th amendment. However, the *McLaughlin* court recognized that this arrangement as “invidious discrimination” because the Florida law judged same-color non-marital sex on a different basis than it judges white-black non-marital sex: “Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.”

The *McLaughlin* court refused to strike down Florida’s anti-miscegenation marital laws. Yet it overturned the anti-miscegenation non-marital relationship laws on the basis of recognizing interracial sexual relationships as a class:

> Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold § 798.05 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Justice White continued:

> It is readily apparent that § 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple. No couple other than a Negro and a white person can be convicted under § 798.05 and no other section proscribes the precise conduct banned by § 798.05.

Without changing much of Judge White’s language, the same principle can be applied to § 21.06:

> It is readily apparent that § 21.06 treats the same-sex couples differently than it does any heterosexual couple. No couple other than a same-sex couples can be convicted under § 21.06 and no other section proscribes the precise conduct banned by § 21.06.

If cohabitating interracial couples were deemed in the same class as cohabitating white couples and cohabitating black couples, then they could not be treated differently via § 798.05: “Florida has offered no argument that the State’s policy against interracial marriage cannot be as

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125 *Pace v. Alabama* 106 U.S. 583, 585 (1883). There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated, and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

126 *Id.* at 585.

127 Id. § 798.05 of the Florida statutes

128 *Id.*

129 *Id.*
adequately served by the general, neutral, and existing ban on illicit behavior as by a provision such as § 798.05 which singles out the promiscuous interracial couple for special statutory treatment.”

An invidious discrimination was drawn between cohabiting interracial couples on the one hand and cohabiting black couples and cohabitating white couples on the other. Scalia played the *Pace* class warfare game by ignoring other kinds of couples:

> Under *Pace* the Alabama law regulating the conduct of both Negroes and whites satisfied the Equal Protection Clause since it applied equally to the among the members of the class which it reached without regard to the fact that the statute did not reach other types of couples performing the identical conduct and without any necessity to justify the difference in penalty established for the two offenses.

Not finding any “overriding statutory purpose” in 798.08, the *McLaughlin* court concluded via the Equal Protection Clause: “Discrimination of that kind is invidious per se.”

*McLaughlin* demonstrated that equal protection was not simply for whites as couples and blacks as couples, but interracial couples as well. *McLaughlin* affirmed that interracial couples as a class could not be subjected to the invidious discrimination of the Florida anti-miscegenation laws against non-marital relationships. The first Judge Harlan’s dissent in *Plessy* spoke to the badge of inferiority of separate but equal facilities as the basis of degradation. On the basis of such degradation, Judge Harlan identified the illegality of separate but equal. Following *Pace*, however, Scalia overlooked the third class. According to *Pace*, if blacks and whites were equally excluded from each other’s spheres, then the equal protection clause of the 14th amendment would not be violated. Texas Penal Code §21:06 stated:

> A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. The statute defines [d]eviate sexual intercourse as follows: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or .(B) the penetration of the genitals or the anus of another person with an object §21.01(1).

In *McLaughlin* and *Lawrence*, we find stigmatized classes excluded from participating in the same activities in which other classes of people legally engage. Those decisions brought the stigmatized and deviant classes into the mainstream and under the same legal umbrella.

**Constitutional Comparativism and Cultural Chauvinism:**

**Xenophobia and Heritage Hawking**

It is not just that Justice Scalia rejected sodomy to be justified by foreign cases, but that the standards that he applied for rejecting foreign cases were ultimately the standards he applied for accepting cases from “foreign” times, even if they did occur on American soil.

A platitude of our time has not yet registered with Justice Scalia and other legal nationalists:

> The basic difficulty for legal nationalists, who wish to restrict the ideas and reasons deployed in the elaboration of their own national constitutions and laws, is the fact that the world has moved on. Ideas are now constantly circulating across

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130 *Id.*
131 *Id.*

Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification contained in § 798.05 is reduced to an invidious discrimination forbidden by the Equal Protection Clause.

132 *Lawrence*, 539 U.S. at 563.
national boundaries with an inevitable impact on the minds of human beings and the way in which they perceive the world, its people, and its legal, political, and social problems. In the age of globalism, it is virtually impossible to escape the power of global ideas when their time has come. Those ideas inform the “wider civilization” in which all people connected to them now live. In a time of satellite television, jumbo jets, the Internet, cell phones, and global media, it is virtually impossible, at least in most civilized places, to stem the incoming tide of global discussion about science, truth, values, and perceptions of our planet, its inhabitants, the biosphere, and the universe that surrounds us.\textsuperscript{133}

In \textit{Lawrence}, Scalia labeled “foreign views” as “meaningless” and “dangerous” dicta.\textsuperscript{134} Since \textit{Bowers} was not decided on a “wider civilization,” nor should \textit{Lawrence}. Thus, it was meaningless dicta. It was “dangerous dicta” because American law should not be influenced by foreign law. Scalia referred to \textit{Foster v. Florida}, where Judge Thomas argued: “While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”\textsuperscript{135} From Justice Scalia’s perspective, “meaningless and dangerous dicta” described to a tee Justice Kennedy’s inclusion of foreign laws into his Lawrence brief.\textsuperscript{136}

In his concurrence in \textit{Bowers}, Justice Burger averred: “As the Court notes, \textit{ante} at 192, the proscriptions against sodomy have very "ancient roots."”\textsuperscript{137} Claiming that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization,” Justice Burger pointed to Judeo-Christian moral and ethical standards, ancient Roman law, and the English Reformation.\textsuperscript{138} Delivering the opinion of the Court, Justice White asserted: “Proscriptions [homosexuality] against that conduct have ancient roots.”\textsuperscript{139} Unlike Justice Burger, Justice White did not extend “ancient roots” back several millennia to foreign countries, but to early American law: “Sodomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.”\textsuperscript{140} Thus for Justice White and Justice Burger “ancient” had different connotations.

\textsuperscript{133} Kirby, Sexuality and Global Forces, at 487.
\textsuperscript{134} \textit{Lawrence}, 539 U.S. at 598 (Scalia, J. dissenting).
\textsuperscript{135} \textit{Foster v. Florida}, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari). This was a response to Justice Breyer’s dissent:

\begin{quote}
\end{quote}

\textit{Id.} (Breyer, J., dissenting).
\textsuperscript{136} \textit{Lawrence}, 539 U.S. at 558 (Scalia, J. dissenting).


\textit{Id.} at 576 (majority opinion).
\textsuperscript{137} \textit{Bowers}, 478 U.S. at 196.

\textit{Id.}

\textit{Id.}

\textit{Id.}
For Justice Burger, it referred to civilizations outside America and a more distant past, to ancient Rome and Greece and presumably beyond that to the Decalogue.\textsuperscript{141} For Justice White, it referred specifically to the American culture both before and at the time of the ratification of the Bill of Rights, a less distant past. Judge Scalia, then, was correct about the wider civilization charge. The opinion of the \textit{Bowers} court did not refer to a “wider civilization,” if this wider civilization meant to include Roman law and a plethora of nations that followed Judeo-Christian proscriptions against sodomy. Unless the common law was interpreted as deriving from a wider civilization (namely, England), Justice Kennedy was mistaken in his interpretation of \textit{Bowers} being an invitation to transnationalize \textit{Lawrence} on the basis of appeal to a “wider civilization.”

The wider world of law has no place in idiosyncratic American law, according to legal nationalists such as Judge Scalia. Two years after \textit{Lawrence}, joining in dissent with Justice Thomas in \textit{Roper v. Simmons}, Justice Scalia excoriated the Court “of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures.”\textsuperscript{142} Rather than follow the rules of \textit{our} country, of our people, “the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact \textit{adheres} to a rule of no death penalty for offenders under 18.”\textsuperscript{143} Scalia rejected out of hand “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world.”\textsuperscript{144} In fact, Scalia issued an ultimatum to the Court:

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the \textit{reasoned basis} of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.\textsuperscript{145} To invoke any law (domestic or foreign) just because it agrees with one’s own thinking and to ignore it when it does not constitutes erroneous adjudication. Cherry-picking is neither an acceptable judicial nor scholarly practice. The same can be said of most people, even scrupulous scientists, intent on proving their theses: “Once your eyes were thus opened you saw confirming instances everywhere: The world was full of verifications of the theory. Whatever happened always confirmed.”\textsuperscript{146} Since the United States does not have same moral and legal framework as rest of the world, say the originalists, it would be unwise to import alien legal cases as a basis for understanding United States law.\textsuperscript{147} According to Scalia, cherry-picking foreign laws represented a dishonest method for adjudicating. Justices cannot understand the foreign law without understanding the jurisprudence of the nation from which the law is gleaned.\textsuperscript{148} According to Justice Breyer, on the other hand, using foreign laws would not mean they are binding.\textsuperscript{149} It

\textsuperscript{141} Id.
\textsuperscript{142} \textit{Roper v. Simmons} 543 U.S. 551, 611 (2005) (Scalia, dissenting). Justice Kennedy maintained: (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” \textit{Id.} at 578 (majority opinion).
\textsuperscript{143} Id. at 623 (Scalia, dissenting).
\textsuperscript{144} Id. at 624.
\textsuperscript{145} Id. at 627.
\textsuperscript{148} Ibid. at 1046.
\textsuperscript{149} Id.
would be practical in limited circumstances.\textsuperscript{150} It also promotes international judicial dialogue and deepens knowledge.\textsuperscript{151}

In his dissent in \textit{Thompson v. Oklahoma}, Justice Scalia rejected the Court’s importation of foreign law to save a teenager from receiving the death penalty:

But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.\textsuperscript{152}

The Court has a duty to be as wary of the foreignness of the past as the foreignness of other nations. Originalists are heritage hawks who defend the unchanging meaning of the sacred text. Yet they fall into the same traps that they accuse transnationalists of falling into with respect to the foreignness of the laws. Originalists are only too happy to accept rational-basis review and to rubber-stamp state laws. The basis for some law vanishes upon the disclosure of scientific research. Originalism itself is inherently flawed because the subsequent amendments to the Bill of Rights prove that the original Bill of Rights was flawed or to be charitable woefully incomplete. The famous “crime against nature” is no more. In order for there to be crime, there must be a law. That law was as follows: human beings and the rest of animals in the animal kingdom were inherently heterosexual. No crime can be committed when there is no law to be broken. Since the law of exclusive heterosexuality has been disproven, homosexuals can no longer commit the famous crime against “nature,” which manifests diverse sexual behavior.

Judge Kennedy did not make the argument for the foreignness of the past, but he identified an “emerging awareness” of a new sexual morality. He pointed to a congealing of consensus of western nations regarding homosexuality. That emerging awareness was evidenced by the rapid repealing of sodomy laws. Before 1961, every state has sodomy laws.\textsuperscript{153} At the time of \textit{Bowers} in 1986, only 24 states had sodomy laws.\textsuperscript{154} At the time of \textit{Lawrence}, only 13 had sodomy laws.\textsuperscript{155} The emerging awareness was not limited to the just the United States. Countries in Western Europe, whose laws and traditions issued from the same cradle of western civilization, also experienced this emerging awareness. In the country from which we derived our law (Great Britain), the Wolfenden Report (1957) recommended the repeal of laws punishing homosexuals and Parliament enacted those recommendations in 1967. The European Court of Human Rights (authoritative to all 41 members of the Council of Europe) struck down a law that forbade two men the right to have consensual homosexual conduct (\textit{Dudgeon v. Northern Id.} at 1046-1047.

\textsuperscript{150} \textit{Id.} at 1070.

\textsuperscript{151} \textit{Id.} at 1046-1047.

\textsuperscript{152} \textit{Thompson v. Oklahoma} 487 U.S. 815. Justice Stevens referred to the “civilized standards of decency” pertaining to executing people under 16 years of age (at the time of their offense). \textit{Id.} at 830. These civilized standards of decency are found in nations that sharing our Anglo-American heritage (United Kingdom, New Zealand, Australia), leading members of the Western European community, including West Germany, France, Portugal, The Netherlands, Canada, Italy, Spain, and Switzerland, and even the Soviet Union. \textit{Id.} at 830-831. Justice Brennan’s dissent in \textit{Stanford v. Kentucky} echoed Justice Stevens’ comments: “Many countries, of course -- over 50, including nearly all in Western Europe -- have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason” \textit{Stanford v. Kentucky} 492 U.S. 361, 389 (Brennan, dissenting).

\textsuperscript{153} \textit{Lawrence}, 539 U.S. at 572.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.} at 573.
Ireland). There is an overarching trend toward the decriminalization of sodomy not only in the United States, but in the western world. What Justice Kennedy saw was a paradigm shift of sexual morality, which can be understood in terms of how “an existing paradigm has ceased to function adequately in the exploration of an aspect of nature.”

Scalia fired back that in the original 13 states at the time of the Constitution, sodomy was considered a criminal offense, as it was when the 14th amendment was ratified in 1868. In the common law of England, the “crime against nature” was considered of “deeper malignity” than rape. But English common law also punished adulterers by death, but Judge Scalia arbitrarily omitted that from his argument, inasmuch as the new sexual morality (which he obviously follows on some level) does not see death a fitting punishment for infidelity. Originalist Scalia also picked and chose and is to law what a cafeteria Catholic is to Catholicism. This is similar to fundamentalists who claim to follow the Bible to tee, but when confronted with passages like Leviticus 20:13, back off from the literal meaning to a more moderate position mediated by the paradigm shift. Yet tradition is often “multifarious, evolving, and complicated.”

Interpreters cannot help but be anachronistic, reading their “own values and viewpoint back into the past.” The sin that originalists counsel against is the sin they commit: cherry-picking, by unwittingly manipulating “tradition by focusing on features” congenial to their positions “and ignoring the rest and by interrogating that fragmentary tradition with loaded questions.” This explains why Scalia could use the obviously weak data that does nothing to bolster his case: that there were two prosecutions against sodomy per year during the years 1880-1990. What an epidemic.

156 Dudgeon v. Northern Ireland 7525/76 [1981] ECHR 5 (22 October 1981) Cf. Justice Scalia’s dissent with that of Judge Zekkia, who also reached back to ancient, but at least admitted possible cultural bias:

1. Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy. Moral conceptions to a great degree are rooted in religious beliefs.

2. All civilised countries until recent years penalised sodomy and buggery and akin unnatural practices.

In Cyprus criminal provisions similar to those embodied in the Acts of 1861 and 1885 in the North of Ireland are in force. Section 171 of the Cyprus Criminal Code, Cap. 154, which was enacted in 1929, reads: “Any person who (a) has carnal knowledge of any person against the order of nature, or (b) permits a male person to have carnal knowledge of him against the order of nature is guilty of a felony and is liable to imprisonment for five years.” Under section 173, anyone who attempts to commit such an offence is liable to 3 years’ imprisonment. While on the one hand I may be thought biased for being a Cypriot Judge, on the other hand I may be considered to be in a better position in forecasting the public outcry and the turmoil which would ensue if such laws are repealed or amended in favour of homosexuals either in Cyprus or in Northern Ireland. Both countries are religious-minded and adhere to moral standards which are centuries’ old.

Id. (Zekia, dissenting).


158 Lawrence, 539 U.S. at 596 (Scalia, dissenting).

159 Bowers, 478 U.S. at 197 (Burger, J., concurring). This only goes to underscore the validity of the sexual paradigm shift. Once the crime against nature tag or stigma is removed, the crime of rape—its profound physical and psychological damage to victims—jumps to the top of the list of sexual offenses.

160 “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”

161 William N. Eskridge, Jr., Sodomy and Guns at 194.

162 Id.

163 Id.
Agrarian societies demanded a sexual morality encouraging procreation, which was reflected in the law and such enjoinders “Be fruitful and multiply.” This was a true for the early Americans as it was for the Jews of the Old Testament. See Walter Wink, Homosexuality and the Bible by Walter Wink, www.soulforce.org/article/homosexuality-bible-walter-wink (accessed 31 January 2010) (“One can appreciate how a tribe struggling to populate a country in which its people were outnumbered would value procreation highly, but such values are rendered questionable in a world facing uncontrolled overpopulation.”) and Seventh-Day Adventist Kinship, Homosexuality: Another Adventist Point of View (http://www.sdakinship.org/anotherpov/05.htm) (accessed 31 January 2010):

One can imagine how a tribe struggling to populate an area in which it was a minority would value procreative potential. In addition, within the patriarchalism of Old Testament Jewish culture, heterosexual male dignity was considered compromised when a man assumed female roles (including sexual activities). Furthermore, because certain ritualized homosexual practices (not a loving adult consensual same-sex relationship) were associated with idolatrous practices (idolatry considered the “abomination”), it was considered “un-Jewish.”

Sexual acts had to be geared toward procreation, lest the society would perish, especially by encroaching enemies. This is why in both Old Testament and early American cultures onanism is as sinful as homosexuality. In both cases, very valuable semen cannot be taken away from procreative activity essential for the survival of civilization. In contrast, in a wealthy industrialized society, there is no good reason to ban homosexuality and sodomy. The rationale has been removed from the law. Also, there is no rationale for accepting “traditional” rationale against masturbation, inasmuch as most of us do not hold that homosexual or masturbatory acts equivalent to murder: “Hence the spilling of semen for any nonprocreative purpose--in coitus interruptus (Gen. 38:1-11), male homosexual acts, or male masturbation--was considered tantamount to abortion or murder.”

The moral commitments of legislators, judges, and voters two centuries ago are out of synch with the commitments today: “And if democratic legitimacy is the measure of a sound constitutional interpretive practice, then Justice Scalia needs an account of why and how rote obedience to the commitments of voters two centuries distant and wildly different in racial, ethnic, sexual, and cultural composition can be justified on democratic grounds.” Recourse to Article V of the Constitution “is both undemocratic and unattractive.” On the contrary: “If the rationale underlying a certain rule of law has evaporated, then Cardozo’s standard would instruct judges to consider setting that rule aside. And if, after careful deliberation, the court firmly believed that the rule has no place in modern society, then it should strike it down.” Ultimately, [l]aws must

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164 See Walter Wink, Homosexuality and the Bible by Walter Wink, www.soulforce.org/article/homosexuality-bible-walter-wink (accessed 31 January 2010) (“One can appreciate how a tribe struggling to populate a country in which its people were outnumbered would value procreation highly, but such values are rendered questionable in a world facing uncontrolled overpopulation.”) and Seventh-Day Adventist Kinship, Homosexuality: Another Adventist Point of View (http://www.sdakinship.org/anotherpov/05.htm) (accessed 31 January 2010):

165 See Lawrence, 539 U.S. at 568 (“Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”).


167 Greene, Selling Originalism at 659.

168 Id.

169 John C. Toro, Charade of Tradition-Based Substantive Due Process, 206 (2009). (“Under Cardoza’s framework, the dialogue would focus on the ethical legitimacy of the court’s decisions—not on whether they find support on the dusty annals of tradition.”) Id. Cardoza’s standard would promote a dialogue on the living law:

As a result, Cardoza’s standard would require judges to engage in an open debate about good governance, which is, in a fundamental sense, what constitutional law is all about. Using Cardoza’s standard, judges would not be able to defer blame for unjust decisions to Blackstone or Lord Coke. Instead, judicial decisions would stand or fall on the cogency of the justifications on which they rest.

Id. at 203-204 (citations omitted).
be sustainable as a matter of fundamental fairness.”170 The rationale is clearly lacking with regard to sodomy. Kinsey’s findings are only the tip of the iceberg inasmuch as the Center for Disease Control has substantiated the preponderance of sodomy among both heterosexual and homosexual males and females.171 If the crime against nature is supposed to refer to the behavior in the larger animal kingdom, that myth too has been dispelled: “Homosexual behavior occurs in more than 450 different kinds of animals worldwide and is found in every major geographic region and every major animal group.”172

Meaningless and dangerous dicta can not only come from the laws of foreign countries, but also from the laws of the foreign past, even if it is within the heritage of one’s own country. With regard to the so-called crime against nature, why should laws from the time of Henry VIII be considered any less foreign than the laws of foreign countries that are our historical contemporaries? These so-called foreign countries share our basic values at least as much early Americans did, perhaps more. Jews and Christians living side by side in 2010 have much more in common with each other even while practicing different religions than they do with Moses or Saint Paul. Similarly, it can be forcefully argued that Americans living in 2010 have at least much in common with their English, Swedish, Spanish, Italian, French, Norwegian, Irish, Scottish, and German contemporaries as they do with Americans living in 1776 or before. It is not simply the passage of time that matters, but also the technological changes and advances in scientific knowledge. What Americans share with western European nations is a post-Kinsey, post-Einstein, post-Industrial Revolution, post-global economy, and a post-computer perspective. Despite obvious cultural differences, the lifestyles and resultant values of western nations with a broad common heritage and a common historical locus are similar. At the very least, the degree of difference with such nations is as great as the difference of ancestors living in the same country but in “ancient times.” By the principle of comparative foreignness, the values and beliefs of contemporaneous but different cultures are conceivably no more alien to each other than values and beliefs of ancient and contemporary people within the same culture.

Scalia’s xenophobia is coupled with his antiquarian inclinations. He suffers from what historian David Hackett Fischer called the “antiquarian fallacy”: “An antiquarian is a collector of dead facts, which he stuffs full of sawdust and separately encloses in small glass cases. Often he is a gentleman (or lady) of respectable origins who is utterly alienated from the present. The past serves him as a sanctuary from a sordid world he neither accepts nor understands.”173 It is imperative to learn from the wisdom of our predecessors, but also to recognize their limitations, of no fault of their own but owing to the body of knowledge available to them.174 Scalia made the same mistakes of professional historians: “Whenever a professional historian deliberately

170 Id.
171 See n. 23 and n. 25 supra.
172 Bagemihl, BIOLOGICAL EXUBERANCE, at 12.
174 Id. 298.

The collective experience of mankind [when our ancestors lived] was less extended in their time than ours. Their opinions, therefore, partook more nearly of the youth of mankind than ours do. As the date of their opinions is distant from the present, so in the same proportion are their opinions less mature than our own. An eighteenth century idea, in this sense, is not two centuries older than a twentieth century idea, but two centuries younger. If the premises of an argument to age are granted, then the distance of an ancestor’s opinions from the present should be in the same degree a presumption against their validity rather than for it.

Id.
cuts himself off from his own time in order to study somebody else’s, he commits the same mistake.”

Scalia exaggerated intercultural differences and is blind to intra-cultural temporal differences. The fashions, fads, and moods of colonial Americans influenced their moral and legal perspectives. Pre-Darwin, pre-Einstein, pre-Kinsey colonial Americans, pre-Industrial Revolution, pre-computer revolutions Americans could be said be as different in kind from us as we are from western Europeans.

Ancient roots can be rotten, as in the case laws that affirmed a husband raping his wife. Ancient roots can also be inapplicable by virtue of the fact that the conditions for them no longer exist. Prohibitions against homosexuality have no rationale when there are more than enough people to populate a society. Put positively, common historical situations (sharing a viewpoint on the driving issues of the day) among different societies can be the source of more commonality than a common heritage, especially when there is a great temporal abyss between epochs. Put negatively, beware of the foreignness of heritage as much as the foreignness of the different culture. Even if sodomy laws were deeply rooted in our nation (even though, as Justice Kennedy cited from historical studies, the concept of homosexuality was a late 19th century category invention), the rationale for such laws has been pulled out from under them. In Lawrence, Scalia preferred to play the coroner and conducted his autopsies on a dead constitution rather than playing the doctor to improve the health of a patient. Dismissive as Scalia was of the emerging awareness, it was now around him and surrounded him like an island. Theory-heavy on originalism and morally and politically bent toward conservatism, Scalia transmuted the emerging awareness into a mood or fashion instead of a basis for a paradigm shift. The essence of adjudication was lost on Scalia with his fundamentalist literalism.

The litmus test for Scalia for unenumerated rights was deep rooted traditions. But the immediate issue is: whose traditions? Were they the traditions of the white male minority, or of Native Americans, women, and African-Americans? The deep roots test does not tell courts how to characterize traditions or how to choose between restrictive (narrow) and permissive (broad) traditions:

To sum up, the deep roots test does a poor job of eliminating moral-political judgments from the substantive due process framework because judges are free to "cherry-pick" from history to support their preconceived opinions; judges have discretion in characterizing the relevant tradition; and, even if a court determines that an asserted right is supported by history and tradition, it must still engage in the value-laden endeavor of determining whether the right should be given contemporaneous protection - a step in the analysis that the Court has not yet acknowledged but which is critical to prevent the inquiry from becoming absurd.

The roots are often rotten to the core. In common law, for example, it was not possible for a man to rape his wife. Lord Hale’s principle that husbands cannot rape their wives was widely followed by courts in the United States. Are traditions deeply rooted in patriarchy also to be given over to rational-basis review and rubber-stamped? Obviously any justification rape has no place in modern society. That being the case, any laws allowing rape should be struck down in

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175 Id., at 141.
176 Lawrence, 539 U.S. at 564.
177 John C. Toro, The Charade of Tradition-Based Substantive Due Process. Relying on tradition to determine which unenumerated rights deserve constitutional protection necessarily leads to the question: Whose traditions count?
178 Id.
179 Id.
180 Id.
the name of fairness to women, who are no longer conceived as chattel. In *re Estate of Peters*, the Supreme Court of Vermont rejected a husband’s common law’s marital rape exemption defense. Realizing these roots of tradition were rotten, the Supreme Court of Vermont extirpated them. On the other hand, in *People v. Brown*, (Colo. 1981), the Court upheld the marital exemption because the state had an interest “in encouraging and preserving marital relationships.” In the first case, the Court extirpated the deep roots that have as their rationale the supposition of women as chattel. In the second case, traditional values were invoked. In the case of sodomy, should an emerging awareness of sexuality, based in some part of scientific research be the basis for re-evaluating a tradition, especially if the crime against nature tradition statutes trace their lineage (appropriately) to the reign of Henry VIII.”

Remnants of the 16th century still echo in American laws: “Any person who shall commit the abominable and detestable crime against nature, not to be named among Christians, with either man or beast, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy.” N.C. Rev. Stat. ch. 34, § 6 (1837) (derived from 25 Hen. VIII, c. 6 and 5 Eliz., c. 17).

Why in Georgia should a seventeen-year-old teenager be sentenced to ten years in prison and be required to register as a sex offender for having consensual oral sex with a fifteen-year-old girl, when “if the teenager had engaged only in vaginal sex with the girl, his crime would have been a misdemeanor under Georgia law and would not have required sex offender registration or a minimum of ten years in prison”?

V. Conclusion

For Scalia, the grand theory of originalism is a mask for his acceptance of the status quo in his *Lawrence* dissent. By his reckoning, gay people will never pass any test for suspect or quasi-suspect class status and will never be eligible for heightened scrutiny. His insistence on

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181 *Id.*

182 *Id.* n. 107. *People v. Brown* 632 P.2d 1025 (Colo. 1981): (“The legitimate state interest in encouraging the preservation of family relationships supports the distinction between assailants who are married to and living with their victims from those who are not.”) Curtis and Gilreath, *Oral Sex Felons*.


14-177. Crime against nature

If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.

HISTORY: 25 Hen. VIII, c. 6; 5 Eliz., c. 17; R.C., c. 34, s. 6; 1868-9, c. 167, s. 6; Code, s. 1010; Rev., s. 3349; C.S., s. 4336; 1965, c. 621, s. 4; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1191; 1994, Ex. Sess., c. 24, s. 14(c).

185 Curtis and Gilreath, “Oral Sex Felons”:

The crimes against nature statute has a long history in North Carolina. In 1819, the "vice of buggery" was reported as being in force in this State and had been illegal in England since the reign of Henry the Eighth in 1533. 1 Potter, Laws of North Carolina, 90 (1821). By 1837, the statute had substantially taken its current form. In 1868, the death penalty was replaced by a prison term of five to sixty years. Public Laws 1868-69, c. 167, § 6. Subsequent amendments have altered the level of offense, but have not changed the substance of the offense significantly, which in current form reads: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C. Gen. Stat. § 14-177 (2005).” In this case, the Court upheld the law against nature principle because *Lawrence* could not be applied to minors.

*Id.*
legal nationalism, rational-basis review, and deeply rooted traditions set up a mine field through which any forays toward queer equality were doomed to failure. Believing that the Constitution to be set in stone (except when he needs it to be like putty), fundamentalist Scalia construed any “interpretation” as sacrilege and tantamount to activism. In choosing between a living or dead Constitution, Scalia opted for the stone cold corpse. A living constitution for him was a pretext to take license with the literal words. However, the epistemological reality is this: it is not that license is taken but the degree to which license is taken. Literalists literally cannot be literalists. Each intellectual encounter with the Constitution, no matter the care to view it objectively, entails the justices using their respective value scales to weigh the laws. Because Justice Scalia refused or denied that he was using his own scale, he was in more danger to the court than those who understood no matter how carefully they weighed the principles, it is their own scales by which those matters are being weighed. Scalia’s scale was weighted toward heterosexual dominance, but he preferred to play the game that he was using an objective scale as the basis for his decision. His make-believe neutrality is an affront to even those with a modicum of common sense.

Scalia was quite unable to learn the lessons of history, in this sense, to see the parallels between oppression against African-Americans and oppression against queer folk. In his famous dissent, the first Justice Harlan refused to review “the decisions of state courts” on which separate but equal was justified. Justice Harlan understood that these state decisions “are wholly inapplicable” because they were made prior to the 13th, 14th, and 15th Amendments “when colored people had few rights which the dominant race felt obliged to respect.” Still, others were made at a time when public opinion in many localities was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land.” Consequently, Justice Harlan reasoned, with the 13th, 14th, and 15th amendments on the books and those being the supreme law, then separate but equal falls by the wayside.

Scalia’s hand was not forced by a constitutional amendment protecting queer folk. But there were a number of precedents in which privacy is established. In the case of case of sodomy, the long line of decisions beginning with Griswold v. Connecticut established a privacy penumbra. The Bowers court refused to see how private and consensual homosexual acts bore any resemblance to using contraceptives and raising and educating one’s children. But if the state had no right to interfere with a person’s reproductive freedom, it also has no right to interfere with a person’s right to choose sexual acts that lead or don’t lead to reproduction. Also, state laws are imbued with invidious discrimination against gay people based on myths of mental illness, hyper-sexuality, and general moral depravity. Added to this, when Bowers was decided, the AIDS scare could be compared to the Red Scare and queer folk were stigmatized as panic set in and scapegoats were sought:

186 Plessy v. Ferguson, at 563 (Harlan, dissenting).
187 Id.
188 Id.
189 Id.
191 Bowers, 478 U.S. at 190-191. “Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated, either by the Court of Appeals or by respondent.”
Tradition as democratic deliberation, moreover, provides a legal basis for distinguishing Lawrence from Bowers. Public opinion underwent a sea change between Bowers in 1986 and Lawrence in 2003, as the sense that AIDS was the homosexuals Trojan Horse receded and as many Americans came, instead, to understand lesbians and gay men as ordinary neighbors and coworkers, often with partners and families. Yet Justice Scalia never comprehended an “emerging awareness” because he was fixated only a body of laws, not their spirit. The spirit of the law means that the law is a living entity and for Scalia the Constitution is dead and inert. He is bound by the letter of the law. His misstep is not realizing that even originalists have to connect the letters of the law. He does not recognize his own machinations. All judges are culpable of connecting the dots and in a sense are “activists.” The adjudication of law depends upon such activism. The written word is lifeless unless activated by the intellect. There is always a danger of playing fast and loose with the Constitution, but the other extreme is the vain attempt to ossify the Constitution when in fact it is altered by how each interpreter weighs its various principles. Rational basis review is not discarded, but becomes rational basis review with bite, scrutinizing laws instead of rubber-stamping them. Fallible human beings with agendas created a magnificent but flawed document and fallible people interpret this magnificent document. Originalists are afraid of getting too far from the Constitution and of distorting its meaning. But there is another danger as well: using the Constitution to justify one’s prejudices. In contrast to following a facile originalism, each age must determine how basic principles apply to groups wearing the badge of inferiority. The badge of inferiority, still attached to sodomy and by extension to gays and lesbians, will not be removed until the Court recognizes that the invidious discrimination against queer folk is based on pre-scientific prejudices concerning sexuality translated into law, the retention of which is made a mockery of by the de facto new sexual morality the vast majority practices and to which they most cheerily subscribe.

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192 William N. Eskridge, Jr., Sodomy and Guns at 213.
193 Curtis and Gilreath, “Oral Sex Felons.” Id. 193 (“Here, the courts actually look critically at the rationality of the statute even though it does not fit into one of the slots previously reserved for substantially heightened scrutiny, e.g., race, gender, fundamental right, etc.”). Id.
194 See Howard Zinn, A PEOPLE’S HISTORY OF THE UNITED STATES (1980). Zinn refers to Charles Beard’s notion that the economic interests of the Framers determined the content of the Constitution:

Thus, Beard found that most of the makers of the Constitution had some direct economic interest in establishing a strong federal government: the manufacturers needed protective tariffs; the moneylenders wanted to stop the use of paper money to pay off their debts; the land speculators wanted protection as they invaded Indian lands; slaveowners needed federal security against slave revolts and runaways; bondholders wanted a government able to raise money by nationwide taxation, to pay off their bonds.

Four groups, Beard noted, were not represented in the Constitutional Convention: slaves, indentured servants, women, men without property. And so the Constitution does not reflect the interests of those groups.

Id. at 90-91.